MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 31, 2018 through May 31, 2019

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

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SUPREME COURT

March 13, 2019

Back row left to right: Justices ELIZABETH T. CLEMENT, DAVID F. VIVIANO, RICHARD H. BERNSTEIN, and MEGAN K. CAVANAGH.

Front row left to right: Justice STEPHEN J. MARKMAN, Chief Justice BRIDGET M. MCCORMACK, and Justice BRIAN K. ZAHRA.

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
STEPHEN J. MARKMAN	2021[1]
BRIDGET M. McCORMACK	2021[2]
Chief Justice Pro Tem	
DAVID F. VIVIANO	2025[3]
Justices	
STEPHEN J. MARKMAN	2021[4]
BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2021[5]
DAVID F. VIVIANO	2025[6]
RICHARD H. BERNSTEIN	2023
KURTIS T. WILDER	2019[7]
ELIZABETH T. CLEMENT	2027
MEGAN K. CAVANAGH	2027[8]

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

TIMOTHY J. RAUBINGER	AARON J. GAUTHIER[10]
SHARI M. OBERG	STACI STODDARD
DEBRA A. GUTIERREZ-McGUIRE	MARK E. PLAZA
ANNE-MARIE HYNOUS VOICE	MOLLY E. HENNESSEY
MICHAEL S. WELLMAN	REGINA T. DELMASTRO
GARY L. ROGERS	CHRISTOPHER M. THOMPSON
SAMUEL R. SMITH[9]	CHRISTOPHER M. SMITH
ANNE E. ALBERS	JONATHAN S. LUDWIG[11]

LIZA C. MOORE[12]

State Court Administrator

MILTON L. MACK, Jr.

Clerk: LARRY S. ROYSTER
Reporter of Decisions: KATHRYN L. LOOMIS
Crier: JEFFREY A. MILLS

[1] To January 9, 2019.
[2] From January 9, 2019.
[3] From January 9, 2019.
[4] From January 9, 2019.
[5] To January 9, 2019.
[6] To January 9, 2019.
[7] To January 1, 2019.
[8] From January 1, 2019.
[9] To April 1, 2019.
[10] To December 18, 2018.
[11] From January 28, 2019.
[12] From January 28, 2019.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
CHRISTOPHER M. MURRAY	2021
Chief Judge Pro Tem	
JANE M. BECKERING	2025
Judges	
DAVID SAWYER	2023
WILLIAM B. MURPHY	2019[1]
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2025
JOEL P. HOEKSTRA	2023[2]
JANE E. MARKEY	2021
PETER D. O'CONNELL	2019[3]
PATRICK M. METER	2021
KIRSTEN FRANK KELLY	2025
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2025
DEBORAH A. SERVITTO	2025
ELIZABETH L. GLEICHER	2025
CYNTHIA DIANE STEPHENS	2023
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2025
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2025
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2023
THOMAS C. CAMERON	2023
JONATHAN TUKEL	2021
ANICA LETICA	2021
JAMES R. REDFORD	2021[4]

Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

[1] To January 1, 2019.

[2] To September 4, 2018.

[3] To January 1, 2019.

[4] From December 21, 2018.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2021
2.	DONNA B. HOWARD	2021[1]
	CHARLES T. LaSATA	2023
	ANGELA PASULA	2025
	SCOTT SCHOFIELD	2021[2]
	JENNIFER L. SMITH	2021[3]
3.	DAVID J. ALLEN	2021
	MARIAM BAZZI	2021
	ANNETTE J. BERRY	2025
	GREGORY D. BILL	2025
	ULYSSES W. BOYKIN	2021
	KAREN Y. BRAXTON	2025
	JEROME C. CAVANAGH	2025
	ERIC WILLIAM CHOLACK	2023
	JAMES R. CHYLINSKI	2023
	ROBERT J. COLOMBO, Jr.	2019[4]
	KEVIN J. COX	2025
	MELISSA ANNE COX	2023
	PAUL JOHN CUSICK	2025
	CHRISTOPHER D. DINGELL	2021
	PRENTIS EDWARDS, Jr.	2025
	CHARLENE M. ELDER	2021

[1] From August 8, 2018.

[2] To September 4, 2018.

[3] To October 8, 2018.

[4] To December 31, 2018.

	Term Expires January 1 of
VONDA R. EVANS	2021[5]
WANDA EVANS	2023
EDWARD EWELL, Jr.	2025
HELAL FARHAT	2021[6]
PATRICIA SUSAN FRESARD	2023
SHEILA ANN GIBSON	2023
JOHN H. GILLIS, Jr.	2021
ALEXIS GLENDENING	2023
TRACY E. GREEN	2025[7]
DAVID ALAN GRONER	2023
RICHARD B. HALLORAN	2019[8]
ADEL A. HARB	2025
BRIDGET MARY HATHAWAY	2025[9]
CYNTHIA GRAY HATHAWAY	2023
DANA MARGARET HATHAWAY	2025
DANIEL ARTHUR HATHAWAY	2021
THOMAS M.J. HATHAWAY	2023
CHARLES S. HEGARTY	2025
CATHERINE HEISE	2025
NOAH P. HOOD	2021[10]
SUSAN L. HUBBARD	2023
MURIEL D. HUGHES	2023
EDWARD JOSEPH	2021
CONNIE MARIE KELLEY	2021[11]
TIMOTHY M. KENNY	2023
DONALD KNAPP	2021
QIANA D. LILLARD	2025
KATHLEEN M. McCARTHY	2025
BRUCE U. MORROW	2023
JOHN A. MURPHY	2023
LYNNE A. PIERCE	2021
LITA MASINI POPKE	2023
KELLY RAMSEY	2023
MARK T. SLAVENS	2023

[5] To February 15, 2019.

[6] From April 1, 2019.

[7] From January 1, 2019

[8] To December 31, 2018

[9] January 1, 2019

[10] From May 6, 2019

[11] To February 19, 2019.

		Term Expires January 1 of
	LESLIE KIM SMITH	2025
	VIRGIL C. SMITH	2019[12]
	MARTHA M. SNOW	2023
	CRAIG S. STRONG	2021
	BRIAN R. SULLIVAN	2023
	LAWRENCE S. TALON	2021
	CARLA TESTANI	2021
	DEBORAH A. THOMAS	2025
	REGINA DANIELS THOMAS	2025[13]
	MARGARET M. VAN HOUTEN	2021
	SHANNON N. WALKER	2021
4.	SUSAN BEEBE JORDAN	2023
	RICHARD N. LAFLAMME	2023
	JOHN G. MCBAIN, JR.	2021
	THOMAS D. WILSON	2025
5.	AMY MCDOWELL	2021
6.	JAMES M. ALEXANDER	2021
	MARTHA ANDERSON	2021
	LEO BOWMAN	2025
	MARY ELLEN BRENNAN	2021
	RAE LEE CHABOT	2023
	JACOB JAMES CUNNINGHAM	2025[14]
	LISA ORTLIEB GORCYCA	2021
	NANCI J. GRANT	2021
	HALA Y. JARBOU	2023
	SHALINA D. KUMAR	2021
	DENISE LANGFORD-MORRIS	2025
	LISA LANGTON	2023
	JEFFREY S. MATIS	2021
	CHERYL A. MATTHEWS	2023
	JULIE A. MCDONALD	2025[15]
	KAREN D. MCDONALD	2025[16]
	PHYLLIS C. MCMILLEN	2025
	DANIEL PATRICK O'BRIEN	2023

[12] To December 31, 2018.

[13] From January 1, 2019.

[14] From January 1, 2019.

[15] From January 1, 2019.

[16] To April 12, 2019.

		Term Expires January 1 of
	WENDY LYNN POTTS	2019[17]
	VICTORIA ANN VALENTINE	2023
	MICHAEL D. WARREN, Jr.	2025
7.	DUNCAN M. BEAGLE	2023
	CELESTE D. BELL	2025
	JOSEPH J. FARAH	2023
	JUDITH A. FULLERTON	2019[18]
	JOHN A. GADOLA	2021
	ELIZABETH ANNE KELLY	2025[19]
	GEOFFREY L. NEITHERCUT	2019[20]
	DAVID J. NEWBLATT	2023
	BRIAN S. PICKELL	2025[21]
	MICHAEL J. THEILE	2021
	RICHARD B. YUILLE	2021
8.	SUZANNE KREEGER	2021
	RONALD J. SCHAFER	2023
9.	PAUL J. BRIDENSTINE	2025
	GARY C. GIGUERE, Jr.	2021
	STEPHEN D. GORSALITZ	2023
	PAMELA L. LIGHTVOET	2025
	ALEXANDER C. LIPSEY	2023
10.	JANET M. BOES	2025
	JAMES T. BORCHARD	2023
	ANDRÉ R. BORRELLO	2023
	DARNELL JACKSON	2025
	MANVEL TRICE, III	2021
11.	WILLIAM W. CARMODY	2021
12.	CHARLES R. GOODMAN	2021
13.	KEVIN A. ELSENHEIMER	2021
	THOMAS G. POWER	2023
14.	TIMOTHY G. HICKS	2023
	KATHY HOOGSTRA	2021
	WILLIAM C. MARIETTI	2023

[17] To December 31, 2018.

[18] To December 31, 2018.

[19] From January 1, 2019.

[20] To December 31, 2018.

[21] From January 1, 2019.

		Term Expires January 1 of
	ANNETTE ROSE SMEDLEY	2025
15.	P. WILLIAM O'GRADY	2021
16.	JAMES M. BIERNAT, Jr.	2025
	RICHARD L. CARETTI	2023
	DIANE M. DRUZINSKI	2021
	JENNIFER FAUNCE	2025
	JULIE GATTI	2027[22]
	JAMES M. MACERONI	2021
	CARL J. MARLINGA	2023
	RACHEL RANCILIO	2023
	EDWARD A. SERVITTO, Jr.	2025
	MICHAEL E. SERVITTO	2023
	MARK S. SWITALSKI	2025
	MATTHEW S. SWITALSKI	2021
	JOSEPH TOIA	2021
	KATHRYN A. VIVIANO	2023
	TRACEY A. YOKICH	2025
17.	CURT A. BENSON	2025[23]
	PAUL J. DENENFELD	2023
	CHRISTINA ELMORE	2025[24]
	KATHLEEN A. FEENEY	2021
	DONALD A. JOHNSTON, III	2019[25]
	DENNIS B. LEIBER	2019[26]
	DEBORAH McNABB	2023
	GEORGE JAY QUIST	2023
	J. JOSEPH ROSSI	2023
	PAUL J. SULLIVAN	2021
	MARK A. TRUSOCK	2025
	CHRISTOPHER P. YATES	2025
	DANIEL V. ZEMAITIS	2021
18.	HARRY P. GILL	2023
	JOSEPH K. SHEERAN	2021
19.	DAVID A. THOMPSON	2021
20.	KENT D. ENGLE	2023
	JON H. HULSING	2021

[22] From January 1, 2019.

[23] From January 1, 2019.

[24] From January 1, 2019.

[25] To December 31, 2018.

[26] To December 31, 2018.

		Term Expires January 1 of
	KAREN J. MIEDEMA	2023
	JON VAN ALLSBURG	2025
21.	PAUL H. CHAMBERLAIN	2023
	MARK H. DUTHIE	2025
22.	ARCHIE CAMERON BROWN	2023
	PATRICK J. CONLIN, Jr.	2021
	TIMOTHY P. CONNORS	2025
	CAROL A. KUHNKE	2025
	DAVID S. SWARTZ	2021
23.	DAVID C. RIFFEL	2023
24.	DONALD A. TEEPLE	2021
25.	JENNIFER A. MAZZUCHI	2021
26.	MICHAEL G. MACK	2021
27.	ROBERT D. SPRINGSTEAD	2025
28.	WILLIAM M. FAGERMAN	2021
29.	MICHELLE M. RICK	2023
	RANDY L. TAHVONEN	2021
30.	ROSEMARIE E. AQUILINA	2021
	LAURA BAIRD	2025
	CLINTON CANADY, III	2023
	WILLIAM E. COLLETTE	2021[27]
	JOYCE DRAGANCHUK	2023
	JAMES S. JAMO	2025
	JANELLE A. LAWLESS	2021
	WANDA M. STOKES	2021[28]
31.	DANIEL J. KELLY	2021
	CYNTHIA A. LANE	2023
	MICHAEL L. WEST	2025
32.	MICHAEL K. POPE	2021
33.	ROY C. HAYES, III	2021
34.	ROBERT BENNETT	2023
35.	MATTHEW J. STEWART	2021
36.	KATHLEEN M. BRICKLEY	2025
	JEFFREY J. DUFON	2021
37.	JOHN A. HALLACY	2025
	TINA YOST JOHNSON	2023
	BRIAN KIRKHAM	2023
	SARAH SOULES LINCOLN	2021
38.	MARK S. BRAUNLICH	2025
	MICHAEL A. WEIPERT	2023
	DANIEL S. WHITE	2021

[27] To July 31, 2018.

[28] From December 30, 2018.

		Term Expires January 1 of
39.	ANNA MARIE ANZALONE	2025
	MARGARET MURRAY-SCHOLZE NOE	2021[29]
	MICHAEL R. OLSAVER	2021[30]
40.	NICK O. HOLOWKA	2023
	BYRON KONSCHUH	2021
41.	MARY BROUILLETTE BARGLIND	2023
	CHRISTOPHER S. NINOMIYA	2021
42.	MICHAEL J. BEALE	2021
	STEPHEN CARRAS	2025
43.	MARK A. HERMAN	2023
44.	L. SUZANNE GEDDIS	2027[31]
	MICHAEL P. HATTY	2025
	DAVID READER	2023[32]
45.	PAUL E. STUTESMAN	2025
46.	COLIN G. HUNTER	2023
	GEORGE J. MERTZ	2021
47.	JOHN B. ECONOMOPOULOS	2023
48.	MARGARET ZUZICH BAKKER	2023
	ROBERTS KENGIS	2021
49.	KIMBERLY L. BOOHER	2021
	SCOTT P. HILL-KENNEDY	2025
50.	JAMES P. LAMBROS	2025
51.	SUSAN K. SNIEGOWSKI	2021
52.	GERALD M. PRILL	2021
53.	AARON J. GAUTHIER	2021[33]
	SCOTT LEE PAVLICH	2023[34]
54.	AMY G. GIERHART	2025
55.	THOMAS R. EVANS	2021
	ROY G. MIENK	2025
56.	JANICE K. CUNNINGHAM	2025
	JOHN DOUGLAS MAURER	2021
57.	CHARLES W. JOHNSON	2025

[29] To January 4, 2019.

[30] From April 1, 2019.

[31] From January 1, 2019.

[32] To April 12, 2019.

[33] From December 19, 2018.

[34] To December 7, 2018.

DISTRICT JUDGES

		Term Expires January 1 of
1.	TERRENCE P. BRONSON	2019[1]
	MICHAEL C. BROWN	2021[2]
	WILLIAM PAUL NICHOLS	2025[3]
	JACK VITALE	2023
2A.	JONATHAN L. POER	2021
	LAURA J. SCHAEDLER	2023
2B.	SARA S. LISZNYAI	2021
3A.	BRENT R. WEIGLE	2021
3B.	JEFFREY C. MIDDLETON	2021
	ROBERT PATTISON	2025
4.	STACEY A. RENTFROW	2021
5.	GARY J. BRUCE	2023
	ARTHUR J. COTTER	2021
	GORDON GARY HOSBEIN	2021[4]
	DONNA B. HOWARD	2021[5]
	STERLING R. SCHROCK	2025
	DENNIS M. WILEY	2023
7.	ARTHUR H. CLARKE, III	2021
	MICHAEL T. McKAY	2023
8.	ANNE E. BLATCHFORD	2025
	CHRISTOPHER T. HAENICKE	2025
	KATHLEEN P. HEMINGWAY	2021
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2023
10.	PAUL K. BEARDSLEE	2021
	SAMUEL I. DURHAM, Jr.	2023
	FRANKLIN K. LINE, Jr.	2021
	JAMES D. NORLANDER	2019[6]

[1] To December 31, 2018.

[2] From August 13, 2018.

[3] From January 1, 2019.

[4] From September 4, 2018.

[5] To August 7, 2018.

[6] To December 31, 2018.

		Term Expires January 1 of
	TRACIE L. TOMAK	2025[7]
12.	JOSEPH S. FILIP	2023
	DANIEL GOOSTREY	2025
	MICHAEL J. KLAEREN	2021
	R. DARRYL MAZUR	2021
14A.	RICHARD E. CONLIN	2021
	J. CEDRIC SIMPSON	2025
	KIRK W. TABBEY	2023
14B.	CHARLES J. POPE	2021
15.	JOSEPH F. BURKE	2025
	ELIZABETH POLLARD HINES	2023
	KAREN Q. VALVO	2021
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2025
17.	KRISTA LICATA HAROUTUNIAN	2021[8]
	KAREN S. KHALIL	2023
18.	SANDRA A. FERENCE CICIRELLI	2025
	MARK A. McCONNELL	2021
19.	L. EUGENE HUNT, Jr.	2023
	SAM A. SALAMEY	2025
	MARK W. SOMERS	2021
20.	MARK J. PLAWECKI	2021
	DAVID TURFE	2025
21.	RICHARD L. HAMMER, Jr.	2021
22.	SABRINA L. JOHNSON	2025
23.	GENO D. SALOMONE	2025
	JOSEPH D. SLAVEN	2021
24.	JOHN T. COURTRIGHT	2021
	RICHARD A. PAGE	2023
25.	GREGORY A. CLIFTON	2021
	DAVID J. ZELENAK	2023
27.	ELIZABETH L. DISANTO	2025[9]
	RANDY L. KALMBACH	2019[10]
28.	JAMES A. KANDREVAS	2021
29.	LAURA REDMOND MACK	2025
30.	BRIGETTE OFFICER HOLLEY	2023
31.	ALEXIS G. KROT	2021
32A.	DANIEL S. PALMER	2021
33.	JENNIFER COLEMAN HESSON	2023
	JAMES KURT KERSTEN	2021
	MICHAEL K. McNALLY	2025
34.	TINA BROOKS GREEN	2025
	BRIAN A. OAKLEY	2023

[7] From January 1, 2019.

[8] From September 26, 2018.

[9] From January 1, 2019.

[10] To December 31, 2018.

		Term Expires January 1 of
	DAVID M. PARROTT	2021
35.	MICHAEL J. GEROU	2023
	RONALD W. LOWE	2025
	JAMES A. PLAKAS	2021
36.	LYDIA NANCE ADAMS	2023
	ROBERTA C. ARCHER	2025
	CHRISTOPHER MICHAEL BLOUNT	2025
	NANCY McCAUGHAN BLOUNT	2021
	IZETTA F. BRIGHT	2023[11]
	DEMETRIA BRUE	2021
	ESTHER LYNISE BRYANT	2021
	DONALD COLEMAN	2025
	KAHLILIA YVETTE DAVIS	2023
	DEBORAH GERALDINE FORD	2023
	RUTH ANN GARRETT	2025
	KRISTINA ROBINSON GARRETT	2023[12]
	WILLIAM AUSTIN GARRETT	2023
	RONALD GILES	2021
	ADRIENNE HINNANT-JOHNSON	2021
	SHANNON A. HOLMES	2021
	PATRICIA L. JEFFERSON	2021
	KENYETTA STANFORD JONES	2023
	ALICIA A. JONES-COLEMAN	2025
	KENNETH J. KING	2021
	DEBORAH L. LANGSTON	2025
	WILLIAM C. McCONICO	2025
	DONNA R. MILHOUSE	2025
	B. PENNIE MILLENDER	2023
	CYLENTHIA L. MILLER	2023
	DAVID PERKINS	2023[13]
	KEVIN F. ROBBINS	2025
	DAVID S. ROBINSON, JR.	2025
	ALIYAH SABREE	2025
	MICHAEL E. WAGNER	2021
	LARRY D. WILLIAMS, JR.	2023
37.	JOHN M. CHMURA	2025
	MICHAEL CHUPA	2021
	SUZANNE M. FAUNCE	2023
	MATTHEW P. SABAUGH	2025
38.	CARL F. GERDS III	2021
39.	JOSEPH F. BOEDEKER	2021

[11] To January 1, 2019.

[12] From March 21, 2019.

[13] To December 31, 2018.

		Term Expires January 1 of
	MARCO A. SANTIA	2019[14]
	CATHERINE B. STEENLAND	2023
	KATHLEEN E. TOCCO	2025[15]
40.	MARK A. FRATARCANGELI	2025
	JOSEPH CRAIGEN OSTER	2021
41A.	ANNEMARIE M. LEPORE	2021[16]
	MICHAEL S. MACERONI	2021[17]
	DOUGLAS P. SHEPHERD	2025
	STEPHEN S. SIERAWSKI	2023
	KIMBERLEY A. WIEGAND	2025
41B.	LINDA DAVIS	2021[18]
	JACOB M. FEMMININEO, JR	2021[19]
	CARRIE LYNN FUCA	2023
	SEBASTIAN LUCIDO	2025
42-1.	DENIS R. LEDUC	2021
42-2.	WILLIAM H. HACKELL III	2025
43.	CHARLES G. GOEDERT	2021
	KEITH P. HUNT	2025
	JOSEPH LONGO	2023
44.	DEREK W. MEINECKE	2025
	JAMES L. WITTENBERG	2023
45.	MICHELLE FRIEDMAN APPEL	2023
	DAVID M. GUBOW	2021
46.	CYNTHIA ARVANT	2023
	SHEILA R. JOHNSON	2021
	DEBRA NANCE	2025
47.	JAMES B. BRADY	2021
	MARLA E. PARKER	2023
48.	MARC BARRON	2023
	DIANE D'AGOSTINI	2025
	KIMBERLY F. SMALL	2021
50.	RONDA FOWLKES GROSS	2025
	MICHAEL C. MARTINEZ	2021
	PRESTON G. THOMAS	2023
	CYNTHIA THOMAS WALKER	2021
51.	TODD A. FOX	2025
	RICHARD D. KUHN, JR.	2021
52-1.	ROBERT BONDY	2025
	THOMAS DAVID LAW	2023

[14] To December 31, 2018

[15] From January 1, 2019.

[16] From December 27, 2018.

[17] To December 21, 2018.

[18] To April 1, 2019.

[19] From May 6, 2019.

		Term Expires January 1 of
	TRAVIS REEDS	2021
52-2.	JOSEPH G. FABRIZIO	2021
	KELLEY RENAE KOSTIN	2023
52-3.	LISA L. ASADOORIAN	2025
	NANCY TOLWIN CARNIAK	2023
	JULIE A. NICHOLSON	2021
52-4.	KIRSTEN NIELSEN HARTIG	2023
	MAUREEN M. McGINNIS	2021
53.	THERESA M. BRENNAN	2021
	L. SUZANNE GEDDIS	2023[20]
	SHAUNA MURPHY	2023[21]
	CAROL SUE READER	2019[22]
54A.	LOUISE ALDERSON	2023
	STACIA J. BUCHANAN	2021
	HUGH B. CLARKE, Jr.	2023
	FRANK J. DeLUCA	2019[23]
	CYNTHIA M. WARD	2025[24]
54B.	RICHARD D. BALL	2023
	ANDREA ANDREWS LARKIN	2025
55.	DONALD L. ALLEN	2023
	THOMAS P. BOYD	2021
56A.	JULIE O'NEILL	2023
	JULIE H. REINCKE	2021
56B.	MICHAEL LEE SCHIPPER	2025
57.	WILLIAM A. BAILLARGEON	2025
	JOSEPH S. SKOCELAS	2021
58.	CRAIG E. BUNCE	2025
	SUSAN A. JONAS	2021
	BRADLEY S. KNOLL	2021
	JUDITH K. MULDER	2023
59.	PETER P. VERSLUIS	2023
60.	HAROLD F. CLOSZ, III	2021
	MARIA LADAS HOOPES	2021
	RAYMOND J. KOSTRZEWA Jr.	2025
	GEOFFREY THOMAS NOLAN	2023
61.	NICHOLAS S. AYOUB	2023[25]
	DAVID J. BUTER	2021
	MICHAEL J. DISTEL	2025

[20] To December 15, 2018.

[21] From December 30, 2018.

[22] To December 31, 2018.

[23] To December 31, 2018.

[24] From January 1, 2019.

[25] From January 1, 2019.

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	CHRISTINA ELMORE	2023[26]
	JENNIFER FABER	2023
	JEANINE NEMESI LaVILLE	2025
	KIMBERLY A. SCHAEFER	2021
62A.	PABLO CORTES	2021
	STEVEN M. TIMMERS	2025
62B.	WILLIAM G. KELLY	2021
63.	JEFFREY J. O'HARA	2021
	SARA J. SMOLENSKI	2021
64A.	RAYMOND P. VOET	2021
64B.	DONALD R. HEMINGSEN	2021
65A.	MICHAEL E. CLARIZIO	2021
65B.	STEWART D. McDONALD	2021
66.	WARD L. CLARKSON	2025
	TERRANCE P. DIGNAN	2021
67-1.	DAVID J. GOGGINS	2021
67-2.	MARK W. LATCHANA	2023
	JENNIFER J. MANLEY	2021
67-3.	VIKKI BAYEH HALEY	2021
67-4.	MARK C. McCABE	2021
	CHRISTOPHER R. ODETTE	2025
67-5.	WILLIAM H. CRAWFORD, II	2025
	G. DAVID GUINN	2021
	HERMAN MARABLE, Jr.	2025
	NATHANIEL C. PERRY, III	2021
70-1.	TERRY L. CLARK	2025
	M. RANDALL JURRENS	2023
70-2.	ELIAN FICHTNER	2021
	ALFRED T. FRANK	2021
	DAVID D. HOFFMAN	2025
71A.	LAURA CHEGER BARNARD	2021
71B.	KIM DAVID GLASPIE	2021
72.	MICHAEL L. HULEWICZ	2023
	JOHN D. MONAGHAN	2025
	CYNTHIA SIEMEN PLATZER	2021
74.	MARK E. JANER	2023
	TIMOTHY J. KELLY	2025
	DAWN A. KLIDA	2021
75.	MICHAEL CARPENTER	2021
76.	ERIC R. JANES	2021
77.	PETER M. JAKLEVIC	2021
78.	H. KEVIN DRAKE	2021
79.	PETER J. WADEL	2021
80.	JOSHUA M. FARRELL	2021

[26] To December 31, 2018.

		Term Expires January 1 of
82.	RICHARD E. NOBLE	2021
84.	AUDREY D. VAN ALST	2021
86.	ROBERT A. COONEY	2025[27]
	THOMAS J. PHILLIPS	2019[28]
	MICHAEL STEPKA	2023
89.	MARIA I. BARTON	2021
90.	JAMES N. ERHART	2021
92.	BETH A. GIBSON	2021
93.	MARK E. LUOMA	2021
94.	STEVE PARKS	2021
95A.	JEFFREY G. BARSTOW	2021[29]
95B.	JULIE A. LaCOST	2021
96.	ROGER W. KANGAS	2021
	KARL WEBER	2023
97.	MARK A. WISTI	2021

[27] From January 1, 2019.

[28] To December 31, 2018.

[29] To April 1, 2019.

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	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2020
CARL F. JARBOE	2022
THEODORE A. METRY	2020
MATTHEW R. RUMORA	2022

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2025
Alger/Schoolcraft	CHARLES C. NEBEL	2025
Allegan	MICHAEL L. BUCK	2025
Alpena	THOMAS J. LaCROSS	2025
Antrim	NORMAN R. HAYES	2025
Arenac	RICHARD E. VOLLBACH, Jr.	2025
Baraga	TIMOTHY S. BRENNAN	2025
Barry	WILLIAM M. DOHERTY	2025
Bay	JAN A. MINER	2025
Benzie	JOHN D. MEAD	2025
Berrien	BRIAN BERGER	2025
Berrien	MABEL JOHNSON MAYFIELD	2021
Branch	KIRK A. KASHIAN	2025
Calhoun	MICHAEL L. JACONETTE	2023
Cass	SUSAN L. DOBRICH	2025
Cheboygan	ROBERT JOHN BUTTS	2019[1]
Cheboygan	DARYL P. VIZINA	2025[2]
Chippewa	ERIC BLUBAUGH	2021
Clare/Gladwin	MARCY A. KLAUS	2025
Clinton	LISA SULLIVAN	2025
Crawford	MONTE J. BURMEISTER	2025
Delta	ROBERT E. GOEBEL, Jr.	2019[3]
Delta	PERRY R. LUND	2025[4]
Dickinson	THOMAS D. SLAGLE	2025
Eaton	THOMAS K. BYERLEY	2025

[1] To December 31, 2018.

[2] From January 1, 2019.

[3] To December 31, 2018.

[4] From January 1, 2019.

County		Term Expires January 1 of
Emmet/Charlevoix	VALERIE K. SNYDER	2025
Genesee	JENNIE E. BARKEY	2021
Genesee	F. KAY BEHM	2025
Gogebic	JOEL L. MASSIE	2019[5]
Gogebic	ANNA ROSE TALASKA	2025[6]
Grand Traverse	MELANIE STANTON	2025
Gratiot	KRISTIN M. BAKKER	2025
Hillsdale	MICHELLE SNELL BIANCHI	2025
Houghton	FRASER T. STROME	2025
Huron	DAVID L. CLABUESCH	2025
Huron	DAVID B. HERRINGTON	2021
Ingham	SHAUNA DUNNINGS	2025[7]
Ingham	R. GEORGE ECONOMY	2019[8]
Ingham	RICHARD J. GARCIA	2021
Ionia	ROBERT S. SYKES, Jr.	2025
Iosco	CHRISTOPHER P. MARTIN	2025
Iron	DONALD S. POWELL	2025[9]
Iron	C. JOSEPH SCHWEDLER	2019[10]
Isabella	STUART BLACK	2025[11]
Isabella	WILLIAM T. ERVIN	2019[12]
Jackson	DIANE M. RAPPLEYE	2025
Kalamazoo	TIFFANY ANKLEY	2021
Kalamazoo	CURTIS J. BELL	2025
Kalamazoo	G. SCOTT PIERANGELI	2023
Kalkaska	LYNNE M. BUDAY	2025
Kent	TERENCE ACKERT	2023
Kent	PATRICIA D. GARDNER	2025
Kent	G. PATRICK HILLARY	2025
Kent	DAVID M. MURKOWSKI	2021

[5] To December 31, 2018.

[6] From January 1, 2019.

[7] From January 1, 2019.

[8] To December 31, 2018.

[9] From January 1, 2019.

[10] To December 31, 2018.

[11] From January 1, 2019.

[12] To December 31, 2018.

County		Term Expires January 1 of
Keweenaw	KEITH WAREN DeFORGE	2025[13]
Keweenaw	JAMES G. JAASKELAINEN	2019[14]
Lake	MARK S. WICKENS	2025
Lapeer	JUSTUS C. SCOTT	2025
Leelanau	MARIAN F. KROMKOWSKI	2025[15]
Leelanau	LARRY J. NELSON	2019[16]
Lenawee	GREGG P. IDDINGS	2019[17]
Lenawee	CATHERINE ANN SALA	2025[18]
Livingston	MIRIAM A. CAVANAUGH	2025
Luce/Mackinac	W. CLAYTON GRAHAM	2025
Macomb	KATHRYN A. GEORGE	2021
Macomb	SANDRA A. HARRISON	2025
Manistee	THOMAS N. BRUNNER	2025
Marquette	CHERYL L. HILL	2025
Mason	JEFFREY C. NELLIS	2025
Mecosta/Osceola	TYLER O. THOMPSON	2025
Menominee	DANIEL E. HASS	2025
Midland	DORENE S. ALLEN	2025
Missaukee	CHARLES R. PARSONS	2019[19]
Missaukee	MELISSA J. RANSOM	2025[20]
Monroe	FRANK L. ARNOLD	2021
Monroe	CHERYL E. LOHMEYER	2025
Montcalm	CHARLES W. SIMON, III	2025
Montmorency	BENJAMIN T. BOSLER	2025
Muskegon	GREGORY C. PITTMAN	2025
Muskegon	BRENDA E. SPRADER	2023
Newaygo	GRAYDON W. DIMKOFF	2019[21]
Newaygo	MELISSA K. DYKMAN	2025[22]
Oakland	JENNIFER S. CALLAGHAN	2023

[13] From January 1, 2019.

[14] To December 31, 2018.

[15] From January 1, 2019.

[16] To December 31, 2018.

[17] To December 31, 2018.

[18] From January 1, 2019.

[19] To December 31, 2018.

[20] From January 1, 2019.

[21] To December 31, 2018.

[22] From January 1, 2019.

County		Term Expires January 1 of
Oakland	LINDA S. HALLMARK	2025
Oakland	DANIEL A. O'BRIEN	2021
Oakland	KATHLEEN A. RYAN	2023
Oceana	BRADLEY G. LAMBRIX	2025
Ogemaw	SHANA A. LAMBOURN	2025
Ontonagon	JANIS M. BURGESS	2025
Oscoda	CASSANDRA L. MORSE-BILLS	2025[23]
Oscoda	KATHRYN JOAN ROOT	2019[24]
Otsego	MICHAEL K. COOPER	2025
Ottawa	MARK A. FEYEN	2025
Presque Isle	DONALD J. McLENNAN	2019[25]
Presque Isle	ERIK J. STONE	2025[26]
Roscommon	MARK JERNIGAN	2025
Saginaw	PATRICK J. McGRAW	2025
Saginaw	BARBARA L. METER	2021
St. Clair	ELWOOD L. BROWN	2021
St. Clair	JOHN D. TOMLINSON	2025
St. Joseph	DAVID C. TOMLINSON	2025
Sanilac	GREGORY S. ROSS	2021
Shiawassee	THOMAS J. DIGNAN	2025
Tuscola	NANCY THANE	2025
Van Buren	DAVID DiSTEFANO	2025
Washtenaw	DARLENE A. O'BRIEN	2025
Washtenaw	JULIA OWDZIEJ	2021
Wayne	JUNE E. BLACKWELL-HATCHER	2019[27]
Wayne	DAVID BRAXTON	2021
Wayne	FREDDIE G. BURTON, Jr.	2025
Wayne	JUDY A. HARTSFIELD	2021
Wayne	TERRANCE A. KEITH	2021
Wayne	LISA MARIE NEILSON	2023
Wayne	LAWRENCE PAOLUCCI	2023
Wayne	DAVID PERKINS	2025[28]
Wayne	FRANK S. SZYMANSKI	2025
Wexford	EDWARD VAN ALST	2025

[23] From January 1, 2019.

[24] To December 31, 2018.

[25] To December 31, 2018.

[26] From January 1, 2019.

[27] To December 31, 2018.

[28] From January 1, 2019.

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Arenac	Standish	23
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	53
Chippewa	Sault Ste. Marie	50
Clare	Harrison	55
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	56
Emmet	Petoskey	57
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Suttons Bay	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	11
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	53
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
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MCR 5.162 ccxxix
MCR 5.202 ccxxix
MCR 5.203 ccxxix
MCR 5.205 ccxxx
MCR 5.302 ccxxx
MCR 5.304 ccxxxi
MCR 5.307 ccxxxii
MCR 5.308 ccxxxiii
MCR 5.309 ccxxxiv
MCR 5.310 ccxxxiv
MCR 5.311 ccxxxvi
MCR 5.313 ccxxxvii
MCR 5.402 ccxxxvii
MCR 5.404 ccxxxviii
MCR 5.405 ccxxxix
MCR 5.409 ccxl
MCR 5.501 ccxli
MCR 5.784 ccxli
MCR 6.001 cclxxxii
MCR 6.006 cclxxxiii
MCR 6.302 cxliv
MCR 6.310 cxxxv
MCR 6.425 ..... cclxxx, cclxxxiii
MCR 6.427 cclxxxiv
MCR 6.429 cxxxv
MCR 6.431 cxxxvi
MCR 6.433 cxxxvii
MCR 6.502 ..... cxxxvii, clix
MCR 6.610 cclxxxiv

MCR 7.104 cxxxvii
MCR 7.202 cxlv
MCR 7.204 cxxxviii
MCR 7.205 cxxxviii
MCR 7.206 cxxxix
MCR 7.210 cxl
MCR 7.212 ccxliv
MCR 7.312 ccxliv
MCR 8.110 clxx
MCR 8.111 cxl
MCR 8.119 ccxciii
MCR 8.127 ccxcvi

RULES CONCERNING THE STATE BAR OF MICHIGAN
Rule 15 clxxi

MICHIGAN RULES OF PROFESSIONAL CONDUCT
Rule 1.2 cxl
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MICHIGAN JUDICIAL TENURE COMMISSION IOPS
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RULES RESCINDED

MICHIGAN COURT RULES OF 1985
MCR 9.203 ccxlv
MCR 9.204 ccxlv
MCR 9.205 ccxlv
MCR 9.206 ccxlv
MCR 9.207 ccxlv
MCR 9.208 ccxlv
MCR 9.209 ccxlv
MCR 9.213 ccxlv
MCR 9.214 ccxlv
MCR 9.215 ccxlv
MCR 9.216 ccxlv
MCR 9.217 ccxlv
MCR 9.218 ccxlv
MCR 9.219 ccxlv
MCR 9.226 ccxlv

MCR 9.227 ccxlv
MCR 9.228 ccxlv

RULES RESCINDED AND REPLACED

MICHIGAN COURT RULES OF 1985

MCR 9.200 ccxlv
MCR 9.201 ccxlvi
MCR 9.202 ccxlvii
MCR 9.210 ccxlix
MCR 9.211 cclii
MCR 9.212 ccliii
MCR 9.220 ccliv
MCR 9.221 cclv
MCR 9.222 cclvi
MCR 9.223 cclvii
MCR 9.224 cclviii
MCR 9.225 cclviii

ADMINISTRATIVE ORDER
No. 2019-1

ESTABLISHMENT OF COURT SECURITY COMMITTEES

Entered March 13, 2019, effective immediately (File No. 2018-21)—REPORTER.

The issue of courthouse security is of vital importance to ensure the safety of the public, litigants, and the judicial employees of this state. Therefore, it is ordered that each chief judge or, in any facility with multiple chief judges, one chief judge as designated by consensus of the chief judges, establish a standing courthouse security committee to be chaired by the chief judge or his/her designee. The members of the committee shall include representatives of the court's funding unit, local law enforcement, the Clerk of Court, and other facility stakeholders. The courthouse security committee is responsible for creating and promoting policies and procedures to improve the safety and security of the courthouse.

Each court shall submit to the State Court Administrative Office (SCAO) a local administrative order that establishes the courthouse security committee in accordance with the model local administrative order developed by the SCAO. Courts with multiple chief judges in one location and courts that have multiple locations must follow the instructions provided by the SCAO for establishing the standing courthouse security committee. In developing the security committee,

courts are directed to work with local funding units and to collaborate with other entities in shared facilities, where appropriate.

Proposed local administrative orders must be submitted to the SCAO no later than September 1, 2019.

AMENDED ADMINISTRATIVE ORDER No. 1999-4

AMENDMENT OF ADMINISTRATIVE ORDER 1999-4

Entered May 22, 2019, effective January 1, 2021 (File No. 2017-28) —REPORTER.

On order of the Court, the following order amending Administrative Order No. 1999-4 is adopted, effective January 1, 2021.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

AO No. 1999-4 — Establishment of Michigan Trial Court ~~Case File~~Records Management Standards.

In order to improve the administration of justice; to improve the service to the public, other agencies, and the judiciary; to improve the performance and efficiency of Michigan trial court operations; ~~and~~ to enhance the trial courts' ability to ~~preserve~~create and maintain an accurate record of the trial courts' proceedings, decisions, orders, and judgments pursuant to statute and court rule, it is ordered that the State Court Administrator establish Michigan Trial Court ~~Case File~~Records Management Standards for data, case records, and other court records and that trial courts conform to those standards. The State Court

Administrative Office ~~shall~~must enforce the standards and assist courts in adopting practices to conform to those standards.

Case records under MCR 8.119(D) must be made available electronically to the same extent they are available at the courthouse, provided that certain personal data identifiers are not available to the public. In order to protect privacy and address security concerns, it is ordered that protected personal identifying information, as defined in court rule, filed with the state courts of Michigan in any form or manner and for any purpose must be nonpublic. The State Court Administrative Office must establish standards and develop court forms that ensure all protected personal identifying information necessary to a given court case is provided to the court separately from filed documents except as otherwise required by law.

AMENDED ADMINISTRATIVE ORDER No. 2011-4

E-FILING RULES FOR THE 20TH CIRCUIT COURT, THE OTTAWA COUNTY PROBATE COURT, AND THE 58TH DISTRICT COURT

Entered October 17, 2018, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the following order amending Administrative Order No. 2011-4 is adopted, effective immediately.

[The present language is amended as indicated below by underlining for new text and strike-over for text that has been deleted.]

1. [Unchanged.]

2. Definitions

a.-d. [Unchanged.]

e. "Transition e-filing program" or "project" means the e-filing initiative of the participating courts, the County Clerk, and the Ottawa County Information Technology Department in conjunction with ImageSoft, Inc., and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents during the period after enactment of statutory authority to fund and operate a statewide electronic filing system in ~~the following case types:~~

~~i. The 20th Circuit pilot program will begin testing with adoption case types AB, AC, AD, AF, AG, AM, AN, AO, AY,~~ civil case types ND, NF, NH, NI, NM, NO, NP, NS, NZ, CB, CC, CD, CE, CF, CH, CK, CL, CP, CR, CZ, PC, PD, PR, PS, PZ, ~~criminal case types FC and FH,~~ and domestic relations case types DC, DM, DO, DP, DS, DZ, UD, UE, UF, UI, UM, UN, UT, and UW, ~~and neglect/ abuse case type NA~~.

~~ii. The Ottawa County Probate Court will begin testing with civil case type CZ.~~

~~iii. The 58th District Court will begin testing with general civil case type GC as part of Phase 1 and additionally in other case types as follows:~~

~~1. Phase II: Summary proceedings case types, including LT and SP, beginning with the effective date of this order.~~

~~2. Phase III: Post disposition collection proceedings in small claims proceedings ("SC") beginning with the effective date of this order.~~

~~3. Phase IV: Criminal proceedings case types, including EX, FY, OM, SM, FD, FT, OD, OI, OT, SD, SI, ST, OK, ON, SK, and SN, beginning not less than six months after implementation of Phase II and III.~~

f.-g. [Unchanged.]

3. Participation in the Program.

a. ~~Participation in Ottawa County's program is elective for all case types identified in Section 2.e, above. Participation may be initiated with new case filings or existing case files. At the discretion of the judge, participation may also include postdisposition proceedings in qualifying case types.~~ Beginning December 1, 2018, and to the extent that the system accommodates it, participation in the program shall be mandatory in all pending cases assigned to participat-

ing circuit judges for the case types identified in Section 2. Until the 20th Circuit Court begins electronic case initiation for specific case-type codes, participation shall be assigned following the filing and service of the initial complaint or other initial filing and assignment of the case to a participating judge. At the discretion of the judge, participation may also include post-disposition proceedings in qualifying case types assigned to participating judges.

b. ~~This is a voluntary e-filing project; however, once a case is designated as part of the efiling project, i~~It is presumed that all further documents will be filed electronically. However, Ottawa County recognizes that circumstances may arise preventing one from e-filing. To ensure all parties retain access to the participating courts, parties that demonstrate good cause will be permitted to file documents with the clerk, who will then file the documents electronically. Among the factors the participating courts will consider in determining whether good cause exists to excuse a party from e-filing is a party's access to the Internet.

4.-15. [Unchanged.]

AMENDED ADMINISTRATIVE ORDER No. 2014-12

AMENDMENT OF ADMINISTRATIVE ORDER NO. 2014-12

Entered February 1, 2019, effective immediately (File No. 2019-01)—REPORTER.

On order of the Court, effective immediately, Administrative Order No. 2014-12, the order that established the Michigan Tribal State Federal Judicial Forum, is amended to add a new federal member with a term ending July 1, 2022:

• Magistrate Judge Patricia T. Morris (U.S. District Court, Eastern District of Michigan).

MICHIGAN RULE CHANGES

Adopted August 30, 2018, effective September 1, 2018 (File No. 2002-37)—REPORTER.

On order of the Court, the following amendments are adopted, effective September 1, 2018.*

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(A)-(B) [Unchanged.]

(C) Manner of Service. Service of a copy of a paper on an attorney must be made by delivery or by mailing to the attorney at his or her last known business address or, if the attorney does not have a business address, then to his or her last known residence address. Service on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings.

(1)-(3) [Unchanged.]

* Reporter's Note: The following amendments are of Rules 2.107, 2.111, 2.116, 2.119, 2.406, 2.518, 2.625, 3.101, 3.203, 3.208, 3.211, 3.703, 3.802, 3.903, 3.930, 5.104, 5.105, 5.119, 6.310, 6.429, 6.431, 6.433, 6.502, 7.104, 7.204, 7.205, 7.206, 7.210, and 8.111 of the Michigan Court Rules and of Rule 1.2 of the Michigan Rules of Professional Conduct.

(4) E-mail. Some or all of the parties may agree to e-mail service among themselves by filing a stipulation in that case. Some or all of the parties may agree to e-mail service by a court by filing an agreement with the court to do so. E-mail service shall be subject to the following conditions:

(a)-(c) [Unchanged.]

(d) A paper served by e-mail that an attorney is required to sign may include the attorney's actual signature or a signature block with the name of the signatory accompanied by "s/" or "/s/." That designation shall constitute a signature for all purposes, including those contemplated by MCR 1.109(E)~~2.114(C) and (D)~~.

(e)-(i) [Unchanged.]

(D)-(G) [Unchanged.]

RULE 2.111. GENERAL RULES OF PLEADING.

(A) Pleading to be Concise and Direct; Inconsistent Claims.

(1) [Unchanged.]

(2) Inconsistent claims or defenses are not objectionable. A party may

(a)-(b) [Unchanged.]

All statements made in a pleading are subject to the requirements of MCR 1.109(D)(3) and (E)~~2.114~~.

(B)-(F) [Unchanged.]

RULE 2.116. SUMMARY DISPOSITION.

(A)-(E) [Unchanged.]

(F) Motion or Affidavit Filed in Bad Faith. A party or an attorney found by the court to have filed a motion or an affidavit in violation of the provisions of MCR

1.109(D)(3) and (E)~~2.114~~ may, in addition to the imposition of other penalties prescribed by that rule, be found guilty of contempt.

(G)-(J) [Unchanged.]

RULE 2.119. MOTION PRACTICE.

(A) Form of Motions.

(1) An application to the court for an order in a pending action must be by motion. Unless made during a hearing or trial, a motion must

(a)-(c) [Unchanged.]

(d) be signed by the party or attorney as provided in MCR 1.109(D)(3) and (E)~~2.114~~.

(2)-(4) [Unchanged.]

(B)-(G) [Unchanged.]

RULE 2.406. USE OF FACSIMILE COMMUNICATION EQUIPMENT.

(A)-(G) [Unchanged.]

(H) Signature. For purposes of MCR 1.109(E)~~2.114~~, a signature includes a signature transmitted by facsimile communication equipment.

RULE 2.518. RECEIPT AND RETURN OR DISPOSAL OF EXHIBITS.

(A)-(B) [Unchanged.]

(C) Confidentiality. If the court retains discovery materials filed pursuant to MCR 1.109(D~~C~~) or an exhibit submitted pursuant to this rule after a hearing or trial and the material is confidential as provided by law, court rule, or court order pursuant to MCR 8.119(I), the court must continue to maintain the material in a confidential manner.

RULE 2.625. TAXATION OF COSTS.

(A)-(J) [Unchanged.]

(K) Procedure for Taxing Costs and Fees After Judgment.

(1) [Unchanged.]

(2) Until the judgment is satisfied, the judgment debtor may serve on the judgment creditor a request to review postjudgment taxable costs and fees.

(a) Within 28 days of receipt from a judgment debtor of a request to review postjudgment taxable costs and fees, the judgment creditor shall file with the court a memorandum of postjudgment taxable costs and fees and serve the same upon the judgment debtor. A memorandum of postjudgment taxable costs and fees shall include an itemized list of postjudgment taxable costs and fees. The memorandum must be verified by oath under MCR 1.109(D)(3)~~(a)~~.

(b)-(d) [Unchanged.]

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(C) [Unchanged.]

(D) Request for and Issuance of Writ. The clerk of the court that entered the judgment shall review the request. The clerk shall issue a writ of garnishment if the writ appears to be correct, complies with these rules and the Michigan statutes, and if the plaintiff, or someone on the plaintiff's behalf, makes and files a statement verified in the manner provided in MCR 1.109(D)(3)~~2.114(A)~~ stating:

(1)-(3) [Unchanged.]

(E)-(T) [Unchanged.]

RULE 3.203. SERVICE OF NOTICE AND COURT PAPERS IN DOMESTIC RELATIONS CASES.

(A) Manner of Service. Unless otherwise required by court rule or statute, the summons and complaint must

be served pursuant to MCR 2.105. In cases in which the court retains jurisdiction

(1)-(2) [Unchanged.]

(3) Alternative Electronic Service

(a)-(d) [Unchanged.]

(e) A paper served by alternative electronic service that the friend of the court or an authorized designee is required to sign may include the actual signature or a signature block with the name of the signatory accompanied by "s/" or "/s/." That designation shall constitute a signature for all purposes, including those contemplated by MCR 1.109(E)~~2.114(C) and (D)~~.

(f)-(k) [Unchanged.]

(B)-(J) [Unchanged.]

RULE 3.208. FRIEND OF THE COURT.

(A) [Unchanged.]

(B) Enforcement. The friend of the court is responsible for initiating proceedings to enforce an order or judgment for support, parenting time, or custody. The procedures in this subrule govern contempt proceedings under the Support and Parenting Time Enforcement Act. MCR 3.606 governs contempt proceedings under MCL 600.1701.

(1)-(2) [Unchanged.]

(3) The notice of the show cause hearing shall comply with requirements for the form of a subpoena under MCR 2.506(D).

(a) For the purpose of this subrule, an authorized signature is one that comports with MCR 1.109(E~~D~~).

(b)-(c) [Unchanged.]

(4)-(7) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 3.211. JUDGMENTS AND ORDERS.

(A)-(E) [Unchanged.]

(F) Entry of Judgment or Orders.

(1)-(4) [Unchanged.]

(5) The Judgment Information Form must be filed in addition to the verified statement that is required by MCR 1.109(D)(3)~~3.206~~.

(G) [Unchanged.]

(H) Service of Judgment or Order.

(1) [Unchanged.]

(2) The party securing entry of a judgment or order that provides for child support or spousal support must serve a copy on the party ordered to pay the support, as provided in MCR 2.602(E~~D~~)(1), even if that party is in default.

(3) [Unchanged.]

RULE 3.703. COMMENCING A PERSONAL PROTECTION ACTION.

(A) [Unchanged.]

(B) Petition in General. The petition must

(1)-(5) [Unchanged.]

(6) be signed by the party or attorney as provided in MCR 1.109(E)~~2.114~~. The petitioner may omit his or her residence address from the documents filed with the court, but must provide the court with a mailing address.

(C)-(G) [Unchanged.]

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A) [Unchanged.]

(B) Service When Identity or Whereabouts of Father is Unascertainable

(1) If service cannot be made under subrule (A)(2) because the identity of the father of a child born out of wedlock or the whereabouts of the identified father has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 1.109(D)(3)~~2.114(B)(2)~~, of the attempt to identify or locate the father. No further service is necessary before the hearing to identify the father and to determine or terminate his rights.

(2) [Unchanged.]

(C) Service When Whereabouts of Noncustodial Parent Is Unascertainable. If service of a petition to terminate the parental rights of a noncustodial parent pursuant to MCL 710.51(6) cannot be made under subrule (A)(2) because the whereabouts of the noncustodial parent has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 1.109(D)(3)~~2.114(B)(2)~~, of the attempt to locate the noncustodial parent. If the court finds, on reviewing the affidavit or declaration, that service cannot be made because the whereabouts of the person has not been determined after reasonable efforts, the court may direct any manner of substituted service of the notice of hearing, including service by publication.

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(19) [Unchanged.]

(20) "Petition" means a complaint or other written allegation, verified in the manner provided in MCR 1.109(D)(3)~~2.114(B)~~, that a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child, or that a juvenile has committed an offense.

(21)-(27) [Unchanged.]

(B) [Unchanged.]

(C) Child Protective Proceedings. When used in child protective proceedings, unless the context otherwise indicates:

(1)-(12) [Unchanged.]

(13) "Supplemental petition" means:

(a) a written allegation, verified in the manner provided in MCR 1.109(D)(3)~~2.114(B)~~, that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or

(b) a written allegation, verified in the manner provided in MCR 1.109(D)(3)~~2.114(B)~~, that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or

(c) a written allegation, verified in the manner provided in MCR 1.109(D)(3)~~2.114(B)~~, that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H).

(D)-(F) [Unchanged.]

RULE 3.930. RECEIPT AND RETURN OR DISPOSAL OF EXHIBITS IN JUVENILE PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Confidentiality. If the court retains discovery materials filed pursuant to MCR 1.109(D~~C~~) or an exhibit submitted pursuant to this rule after a hearing or trial and the material is confidential as provided by MCR 3.903(A)(3) or order of the court pursuant to MCR 8.119(I), the court must continue to maintain the material in a confidential manner.

RULE 5.104. PROOF OF SERVICE; WAIVER AND CONSENT; UNOPPOSED PETITION.

(A) Proof of Service.

(1) [Unchanged.]

(2) Except as otherwise provided by rule, proof of service of a paper required or permitted to be served may be by

(a)-(b) [Unchanged.]

(c) authentication under MCR 1.109(D)(3)~~5.114(B)~~ of the person making service.

(3)-(4) [Unchanged.]

(B)-(C) [Unchanged.]

RULE 5.105. MANNER AND METHOD OF SERVICE.

(A) Manner of Service.

(1)-(2) [Unchanged.]

(3) An interested person whose address or whereabouts is not known may be served by publication, if an affidavit or declaration under MCR 1.109(D)(3)~~5.114(B)~~ is filed with the court, showing that the address or whereabouts of the interested person could not be ascertained on diligent inquiry. Except in proceedings seeking a determination of a presumption of death based on absence pursuant to MCL 700.1208(2), after an interested person has once been served by publication, notice is only required on an interested person whose address is known or becomes known during the proceedings.

(4) [Unchanged.]

(B)-(E) [Unchanged.]

RULE 5.119. ADDITIONAL PETITIONS; OBJECTIONS; HEARING PRACTICES.

(A) [Unchanged.]

(B) Objection to Pending Matter. An interested person may object to a pending petition orally at the hearing or by filing and serving a paper which conforms with MCR 1.109(D)~~5.113~~. The court may adjourn a hearing based on an oral objection and require that a proper written objection be filed and served.

(C)-(D) [Unchanged.]

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1) [Unchanged.]

(2) If 6 months have elapsed since sentencing, the defendant may file a motion to withdraw the plea if:

(a) [Unchanged.]

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)~~(2)~~, and

(c) [Unchanged.]

(3)-(4) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) [Unchanged.]

(B) Time for Filing Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed:

(a) [Unchanged.]

(b) if 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion to correct an invalid sentence if:

(i) [Unchanged.]

(ii) The defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)~~(2)~~, and

(iii) [Unchanged.]

(4) [Unchanged.]

(C) [Unchanged.]

RULE 6.431. NEW TRIAL.

(A) Time for Making Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed:

(a) [Unchanged.]

(b) If 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion for new trial if:

(i) [Unchanged.]

(ii) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)~~(2)~~, and

(iii) [Unchanged.]

(4) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 6.433. DOCUMENTS FOR POSTCONVICTION PROCEEDINGS; INDIGENT DEFENDANT.

(A) Appeals of Right. An indigent defendant may file a written request with the sentencing court for specified court documents or transcripts, indicating that they are required to pursue an appeal of right. The court must order the clerk to provide the defendant with copies of documents without cost to the defendant, and, unless the transcript has already been ordered as provided in MCR 6.425(G)~~(2)~~, must order the preparation of the transcript.

(B)-(C) [Unchanged.]

RULE 6.502. MOTION FOR RELIEF FROM JUDGMENT.

(A)-(B) [Unchanged.]

(C) Form of Motion. The motion may not be noticed for hearing, and must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 1.109(D)(3)~~2.114~~. Except as otherwise ordered by the court, the combined length of the motion and any memorandum of law in support may not exceed 50 pages double-spaced, exclusive of attachments and exhibits. If the court enters an order increasing the page limit for the motion, the same order shall indicate that the page limit for the prosecutor's response provided for in MCR 6.506(A) is increased by the same amount. The motion must be substantially in the form approved by the State Court Administrative Office, and must include:

(1)-(15) [Unchanged.]

(D)-(G) [Unchanged.]

RULE 7.104. FILING APPEAL OF RIGHT.

(A)-(B) [Unchanged.]

(C) Claim of Appeal.

(1) Form.

(a) The caption of a claim of appeal shall comply with MCR 1.109(D)(1)~~2.113(C)(1)~~.

(b) [Unchanged.]

(2)-(3) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) [Unchanged.]

(2) An appeal of right in a criminal case must be taken

(a) in accordance with MCR 6.425(G)(1~~3~~);

(b)-(e) [Unchanged.]

(3) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(F) [Unchanged.]

(G) Late Appeal.

(1)-(3) [Unchanged.]

(4) The limitation provided in subrule (G)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the time provided in

MCR 6.310(C), MCR 6.419(C), MCR 6.429(B), and MCR 6.431(A), or if

(a) [Unchanged.]

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)~~(2)~~, and

(c) [Unchanged.]

A motion for rehearing or reconsideration of a motion mentioned in subrule (G)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule (G)(4), and the application for leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.

A defendant who seeks to rely on one of the exceptions in subrule (G)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

(5)-(6) [Unchanged.]

(H) [Unchanged.]

RULE 7.206. EXTRAORDINARY WRITS, ORIGINAL ACTIONS, AND ENFORCEMENT ACTIONS.

(A) General Rules of Pleading. Except as otherwise provided in this rule, the general rules of pleading apply as nearly as practicable. See MCR 1.109 and 2.111-2.113~~3~~4.

(B)-(F) [Unchanged.]

RULE 7.210. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 3.977(J)(3) or MCR 6.425(G)~~(2)~~, or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

(b)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 8.111. ASSIGNMENT OF CASES.

(A)-(C) [Unchanged.]

(D) Actions Arising out of Same Transaction or Occurrence. Subject to subrule 8.110(C),

(1)-(2) [Unchanged.]

(3) the attorney for the party bringing the other action under subrule (1) or the new action under subrule (2) shall notify the clerk of the fact in writing in the manner prescribed in MCR 1.109(D)(2)~~2.113(C)(2)~~. An attorney who knowingly fails to do so is subject to disciplinary action.

(4) [Unchanged.]

RULE 1.2. SCOPE OF REPRESENTATION.

(a) [Unchanged.]

(b) A lawyer licensed to practice in the State of Michigan may limit the scope of a representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the limitation is reasonable under the circumstances and the client gives informed consent, preferably confirmed in writing.

(1) [Unchanged.]

(2) The filing of such documents is not and shall not be deemed an appearance by the lawyer in the case. Any filing prepared pursuant to this rule shall be signed by the party designated as "self-represented" and shall not be signed by the lawyer who provided drafting preparation assistance. Further, the lawyer providing document preparation assistance without entering a general appearance may rely on the client's representation of the facts, unless the lawyer has reason to believe that such representation is false, seeks objectives that are inconsistent with the lawyer's obligation under the Rules of Professional Conduct, or asserts claims or defenses pursuant to pleadings or papers that would, if signed by the lawyer, violate MCR 1.109~~2.114~~, or which are materially insufficient.

(c)-(d) [Unchanged.]

Comment:

Scope of Representation [Unchanged.]

Independence From Client's Views or Activities [Unchanged.]

Services Limited in Objectives or Means [Unchanged.]

Reasonable Under Circumstances

Factors to weigh in deciding whether the limitation is reasonable under the circumstances according to

the facts communicated to the attorney include the apparent capacity of the person to proceed effectively with the limited scope assistance given the complexity and type of matter and other self-help resources available. For example, some self-represented persons may seek objectives that are inconsistent with an attorney's obligation under the Rules of Professional Conduct, or assert claims or defenses pursuant to pleadings or motions that would, if signed by an attorney, violate MCR 1.1092.114 ~~[Signatures of Attorneys and Parties; Verification; Effect: Sanctions]~~. Attorneys must be reasonably diligent to ensure a limited scope representation does not advance improper objectives, and the commentary should help inform lawyers of these considerations.

Illegal, Fraudulent and Prohibited Transactions [Unchanged.]

Staff comment: These amendments update cross-references in the rules, and are intended to reflect changes that are necessary as a result of the Court's recent e-Filing rules amendments.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted August 30, 2018, effective September 1, 2018 (File No. 2016-27)—REPORTER.

On order of the Court, the amendment of Rule 7.2 of the Michigan Rules of Professional Conduct that was scheduled to take effect on September 1, 2018, is deferred until further order of this Court.

Staff Comment: The Court has deferred the effective date of amendments adopted by order dated May 30, 2018. The deferral will allow the Court to consider recently enacted revisions adopted by the American Bar Association to its model rule, and other issues that have been identified during the last several months.

Adopted September 20, 2018, effective January 1, 2019 (File No. 2017-12)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following addition of Rule 2.228 of the Michigan Court Rules is adopted, effective January 1, 2019.

RULE 2.228. TRANSFER TO THE COURT OF CLAIMS.

(A) A notice of transfer to the Court of Claims must be provided before or at the time the defendant files an answer.

(B) After the time provided in subrule (A)—

(1) If the court in which a civil action is pending has concurrent jurisdiction with the Court of Claims, the defendant must seek leave to file a notice of transfer and the court may grant leave if it is satisfied that the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed.

(2) If the court in which a civil action is pending does not have subject matter jurisdiction because the case is within the exclusive jurisdiction of the Court of Claims, MCR 2.227 governs.

Staff Comment: MCL 600.6404(3) allows defendant to transfer a case to the Court of Claims. This rule requires such a transfer to be made at or before the time the defendant files an answer, which is the same period mandated for change of venue under MCR 2.221. The proposal arose from the Court's consideration of *Baynesan v Wayne State University* (Docket No. 154435), in which defendant waited until just a month before trial before transferring a case he could have transferred nearly a year sooner. In subrule (B), the rule distinguishes between courts with concurrent jurisdiction and courts without concurrent jurisdiction when an untimely notice of transfer is filed.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted September 20, 2018, effective January 1, 2019 (File No. 2017-16)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.302 of the Michigan Court Rules is adopted, effective January 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A) [Unchanged.]

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1)-(4) [Unchanged.]

(5) if the plea is accepted, the defendant may be giving up the right to appeal issues that would otherwise be appealable if she or he were convicted at a trial. Further, any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a

writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C)-(F) [Unchanged.]

Staff Comment: The amendment of MCR 6.302 requires a trial court judge to advise a defendant that if a plea is accepted, the defendant will give up the right to appeal issues that might have been available after the conclusion of a trial. Such an advisement would prompt further discussions between counsel and defendant, if necessary.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted September 20, 2018, effective January 1, 2019 (File No. 2017-20)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.202 of the Michigan Court Rules is adopted, effective January 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i)-(ii) [Unchanged.]

(iii) In a domestic relations action, a postjudgment order ~~affecting the custody of a minor~~that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile,

(iv)-(v) [Unchanged.]

(b) [Unchanged.]

Staff Comment: The amendment of MCR 7.202 clarifies what constitutes a final postjudgment order in a domestic relations case for purposes of appeal by right. This issue was raised in *Marik v Marik*, Docket No. 154549.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted September 20, 2018, effective January 1, 2019 (File No. 2017-25)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.1 of the Michigan Rules of Professional Conduct is adopted, effective January 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES.

A lawyer may, on the lawyer's own behalf, on behalf of a partner or associate, or on behalf of any other lawyer affiliated with the lawyer or the lawyer's law firm, use or participate in the use of any form of public communication that is not false, fraudulent, misleading, or deceptive. A communication shall not:

(a)-(c) [Unchanged.]

Except as otherwise provided in this rule, a lawyer who is a retired or former justice, judge, referee, or magistrate may use the title ("justice," "judge," "referee," or "magistrate,") only when the title is preceded by the word "retired" or "former." A justice, judge, referee, or magistrate who is removed from office or terminated on grounds of misconduct is prohibited from using the title.

Comment: [Unchanged.]

Staff Comment: The amendment of MRPC 7.1 restricts and regulates the use of the terms "retired" or "former" for a justice, judge, referee, or magistrate who returns to the practice of law. It applies only where a lawyer is communicating information about the lawyer's services, and thus, would not apply to a former judge who does not return to the practice of law. This amendment is a narrower version than one submitted by the State Bar of Michigan Representative Assembly.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted September 20, 2018, effective April 1, 2019 (File No. 2018-03)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 3.201, 3.210, and 3.211 and addition of Rules 3.222 and 3.223 of the Michigan Court Rules are adopted, effective April 1, 2019.

[Rules 3.222 and 3.223 are new rules and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.201. APPLICABILITY OF RULES.

(A)-(C) [Unchanged.]

(D) When used in this subchapter, unless the context otherwise indicates:

(1) "Case" means an action ~~initiated~~commenced in the family division of the circuit court by:

(a) ~~submission of~~filing an original complaint~~, petition, or citation~~;

(b) ~~acceptance of~~accepting transfer of an action from another court or tribunal; ~~or~~

(c) filing or ~~registration of~~registering a foreign judgment or order.~~;~~

(d) filing a petition under MCR 3.222(C); or

(e) filing a consent judgment under MCR 3.223.

(2)-(3) [Unchanged.]

RULE 3.210. HEARINGS AND TRIALS.

(A) In General.

(1) [Unchanged.]

(2) In cases of unusual hardship or compelling necessity, the court may, upon motion and proper showing, take testimony and render judgment at any time 60 days after ~~the filing of the complaint~~commencing a case regardless of any stay.

(3)-(4) [Unchanged.]

(B)-(E) [Unchanged.]

RULE 3.211. JUDGMENTS AND ORDERS.

(A)-(F) [Unchanged.]

(G) Friend of the Court Review. ~~For all judgments and orders containing provisions identified in subrules (C), (D), (E), and (F), t~~The court may require that the judgment or order be submitted to the friend of the

court for review to determine that it contains the provisions required by subrules (C), (D), (E), and (F).

(H) Service of Judgment or Order.

(1) When a judgment or order is obtained for temporary or permanent spousal support, child support, or separate maintenance, the prevailing party must immediately deliver one copy to the court clerk. The court clerk must ~~write or stamp "true copy" on the order or judgment and~~ file it with the friend of the court.

(2)-(3) [Unchanged.]

RULE 3.222. UNIFORM COLLABORATIVE LAW ACT PROCESS AND AGREEMENTS.

(A) Scope and Applicability of Rules. This rule and MCL 691.1331 *et seq*., the Uniform Collaborative Law Act, govern collaborative law practice in domestic relations cases.

(1) Definitions. For purposes of this rule:

(a) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, that is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state.

(b) "Collaborative law participation agreement" means an agreement by persons to participate in a collaborative law process.

(c) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a court in which persons sign a collaborative law participation agreement and are represented by collaborative lawyers.

(d) "Party A" is the equivalent of a plaintiff and means the party responsible for filing and service requirements.

(e) "Party B" is the equivalent of a defendant and means the non-filing party.

(B) Commencing an Action Involving Parties in a Collaborative Law Process.

(1) Where the parties have entered into a collaborative law participation agreement and do not already have a pending domestic relations case, the parties shall proceed under subrule (C).

(2) Where a party has filed a domestic relations case with the court under MCR 2.102 and the parties subsequently sign a collaborative law participation agreement, the parties shall file notice of the signed agreement and a motion to stay proceedings on a form approved by the State Court Administrative Office.

(a) The court shall either stay the proceedings without a hearing or schedule a hearing on the notice within 28 days after the motion is filed. An initial order granting a stay shall be effective for 364 days from the date of filing of the motion. Upon stipulation of the parties, the court may extend the stay period.

(b) The court may require the parties and collaborative lawyers to file a status report on the collaborative law process. The status report shall be on a form approved by the State Court Administrative Office and shall include only information on whether the process is ongoing, concluded, or terminated. It shall not include a report, assessment, evaluation, recommendation, finding, or other communication regarding the matter.

(c) The parties shall promptly file notice with the court when a collaborative law process concludes or terminates. The notice shall be on a form approved by the State Court Administrative Office.

(i) The stay of the proceeding is lifted when the notice is filed. If the parties reached an agreement, they shall proceed under MCR 3.222(D).

(ii) If the parties have not filed notice before the stay expires, the court shall provide notice of intent to dismiss the case for lack of progress as prescribed by subrule (E). Before dismissing the proceeding, the court shall provide parties an opportunity to be heard.

(C) Establishing Jurisdiction and Starting the Statutory Waiting Period. At any time after a collaborative law participation agreement is signed, if the parties are not already under the court's jurisdiction, the parties may commence an action to submit to the court's jurisdiction.

(1) When the parties have concluded a collaborative law process and are requesting entry of a final judgment or final order, the parties shall file a petition to submit to court jurisdiction and request for entry of a final judgment or final order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and the subject matter of the collaborative law agreement using the case type codes under MCR 8.117. The petition shall:

(i) contain, at a minimum, the grounds for jurisdiction, the statutory grounds to enter the judgment or order, and a request to enter the judgment or order;

(ii) comply with the provisions of MCR 2.113 and MCR 3.206(A);

(iii) be signed by both parties;

(iv) be accompanied by the proposed final judgment or proposed final order, that complies with MCR 3.211 and is signed by both parties;

(v) be accompanied by a verified statement if required by MCR 3.206(B) and judgment information form if required by MCR 3.211(F); and

(vi) under MCL 691.1345, be accompanied by domestic violence screening forms. The domestic violence screening form shall be limited to reporting personal protection actions, domestic violence criminal actions, and child protective actions involving the parties and shall be on a form approved by the State Court Administrative Office. Each party must complete a separate form.

The petition may also contain a request to waive the six-month statutory waiting period under MCL 552.9f.

(b) On the filing of the petition and request for entry of final judgment or final order and payment of the filing fees, the court clerk shall assign a case number and judge. The requirement to issue a summons under MCR 2.102(A) is not applicable. Unless requested by the parties on filing of a motion, the court clerk shall not schedule the matter until either the lifting of a stay granted under subrule (B)(2) or the conclusion of the statutory waiting period, whichever occurs first. The petition under this subrule serves as a complaint and answer and as an appearance of both attorneys, and starts the statutory waiting period(s) under MCL 552.9f.

(2) To commence an action at any time before the conclusion of the collaborative law process, the parties shall file a petition for court jurisdiction and declaration of intent to file a proposed final judgment or proposed final order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and shall state the type of action corresponding to the assigned case type code in MCR 8.117(A)(6). The petition shall:

(i) contain, at a minimum, the grounds for jurisdiction, the statutory grounds to enter the judgment or order, and a request to enter the judgment or order;

(ii) comply with the provisions of MCR 2.113 and MCR 3.206(A);

(iii) be signed by both parties;

(iv) be accompanied by a verified statement if required by MCR 3.206(B), and

(v) under MCL 691.1345, be accompanied by domestic violence screening forms. The domestic violence screening form shall be limited to reporting personal protection actions, domestic violence criminal actions, and child protective actions involving the parties and shall be on a form approved by the State Court Administrative Office. Each party must complete a separate form.

The petition may also contain a request to waive the six-month statutory waiting period under MCL 552.9f.

(b) On the filing of the petition and payment of the filing fees, the court clerk shall assign a case number and judge. The requirement to issue a summons under MCR 2.102(A) is not applicable. Unless requested by the parties on filing of a motion, the court clerk shall not schedule the matter for a pretrial or settlement conference. The petition under this subrule serves as a complaint and answer and as an appearance of both attorneys and starts the statutory waiting period(s) under MCL 552.9f.

(c) At any time during the collaborative law process, the parties may request the court to issue, in addition to a final judgment or final order, any other order approving an agreement resulting from the process.

(d) Unless the collaborative law process has concluded, the parties shall file a status report with the

court within 182 days of the filing date of the petition and again at 364 days. The status report shall be on a form approved by the State Court Administrative Office and shall include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding the matter.

(e) At the conclusion of the collaborative law process, the parties shall file a proposed final judgment or proposed final order that complies with MCR 3.211 and a judgment information form if required by MCR 3.211(F).

(D) Entry of Final Judgment or Final Order.

(1) At its discretion, the court may conduct a hearing before entering the final judgment or final order.

(2) The final judgment or final order shall be served in accordance with MCR 2.602(D).

(3) Nothing in this rule precludes the court from waiving the six-month statutory waiting period in accordance with MCL 552.9f.

(E) Dismissal.

(1) Lack of Progress. The clerk shall provide notice of intent to dismiss the case for lack of progress if:

(a) the parties have not filed a notice that a collaborative law process has concluded or terminated before the expiration of a stay under subrule (B)(2)(a), or

(b) the parties have not filed a proposed final judgment or proposed final order within 28 days after the statutory waiting period has expired.

(2) Notice of Intent to Dismiss. A notice of intent to dismiss the case for lack of progress shall be given in the manner provided in MCR 2.501(C) for notice of trial. The notice shall state that the case will be

dismissed no sooner than 28 days after the date of the notice unless the parties do one of the following:

(a) file a proposed final judgment or proposed final order under this rule,

(b) file a complaint under MCR 2.101, or

(c) request a hearing.

(3) Other Dismissal. A party may dismiss a collaborative law matter commenced under this rule at any time under MCR 2.504.

(F) Terminating the Collaborative Law Process. If a party files a complaint under MCL 691.1335(4)(b)(i), the clerk shall proceed on the complaint in accordance with MCR 2.102(A). The court shall dismiss the petition filed under subrule (C)(1) or (C)(2). Pursuant to MCL 691.1339, the attorneys in the collaborative law agreement are disqualified from representing either party in the new action.

RULE 3.223. SUMMARY PROCEEDING FOR ENTRY OF CONSENT JUDGMENT OR ORDER.

(A) Scope and Applicability of Rules. This rule governs practice and procedure for entering a consent judgment or consent order as an original action.

(B) Definitions. For purposes of this rule:

(1) "Party A" is the equivalent of a plaintiff and means the party responsible for filing and service requirements.

(2) "Party B" is the equivalent of a defendant and means the non-filing party.

(C) Commencing an Action.

(1) The parties shall file a petition to submit to court jurisdiction and request for entry of a proposed consent judgment or proposed consent order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and the subject matter of the proposed consent judgment or proposed consent order using the case type codes under MCR 8.117. The petition shall:

(i) contain, at a minimum, the grounds for jurisdiction, the statutory grounds to enter the judgment or order, and a request to enter the judgment or order;

(ii) comply with the provisions of MCR 2.113 and MCR 3.206(A);

(iii) be signed by both parties;

(iv) be accompanied by the proposed consent judgment or consent order, that complies with MCR 3.211 and is signed by both parties;

(v) be accompanied by a verified statement if required by MCR 3.206(B) and a judgment information form if required by MCR 3.211(F); and

(vi) under MCL 691.1345, be accompanied by domestic violence screening forms. The domestic violence screening form shall be limited to reporting personal protection actions, domestic violence criminal actions, and child protective actions involving the parties and shall be on a form approved by the State Court Administrative Office. Each party must complete a separate form.

(b) The petition may contain a request to waive the six-month statutory waiting period under MCL 552.9f.

(2) The petition filed under subrule (1)(a) serves as a complaint and answer unless a party files an objection under subrule (5). It also serves as an appearance of the attorney who signs the petition.

(3) On the filing of the petition and request for entry of consent judgment or consent order and payment of the filing fees, the court clerk shall:

(a) assign a case number and judge, and shall issue a notice of the filing on a form approved by the State Court Administrative Office to be served by Party A as provided in MCR 2.103 and 2.105. The court clerk shall not issue a summons under MCR 2.102(A), and

(b) schedule a hearing date on the proposed consent judgment or consent order but shall not schedule the matter for any pretrial proceedings unless requested by the parties on filing of a motion. The hearing date may not be scheduled sooner than 60 days after the date of the notice of filing. Nothing in this rule precludes the court from waiving the six-month statutory waiting period in accordance with MCL 552.9f.

(4) The notice of the filing must be issued "In the name of the people of the State of Michigan," under the seal of the court that issued it. It must be directed to both parties and include:

(a) the name and address of the court,

(b) the names of the parties,

(c) the case number and name of assigned judge,

(d) the names, addresses, and bar numbers of any attorneys representing the parties,

(e) the date on which the notice of filing was issued,

(f) the date on which the proposed consent judgment or order will be heard by the court,

(g) a statement that if either party objects to this summary proceeding at any time before entry of the proposed consent judgment or consent order, the case will be dismissed, and

(h) a statement that the hearing on the proposed consent judgment or consent order will be held under MCR 3.210 at the conclusion of any applicable statutory waiting period.

(5) If either party objects to this summary proceeding any time before entry of the proposed consent judgment or proposed consent order, the court shall dismiss the case.

(6) At any time after the filing of the proposed consent judgment or proposed consent order, the parties may file stipulations and motions and the court may enter temporary orders.

(D) Entry of Final Consent Judgment or Consent Order. The court shall conduct a hearing on the proposed consent judgment or proposed consent order in accordance with MCR 3.210. Except when a consent judgment is derived through MCR 3.222, both petitioners shall be present for this hearing. The final consent judgment or final consent order shall be served in accordance with MCR 2.602(D).

(E) Dismissal. A party may dismiss a matter commenced under this rule at any time under MCR 2.504 or as provided under subrule (C)(5).

Staff Comment: The amendments of MCR 3.201, 3.210, and 3.211 and addition of MCR 3.222 and 3.223 integrate the collaborative law process designed under the Uniform Collaborative Law Act (159 PA 2014; MCL 691.1331-691.1354) into the state's trial court system for practical use, and add a similar process for parties not represented by counsel who seek to submit a consent judgment.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted September 24, 2018, effective January 1, 2019 (File No. 2013-05 and No. 2014-46)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments re-

ceived, the following amendments of Rule 6.502 of the Michigan Court Rules and Rule 3.8 of the Michigan Rules of Professional Conduct are adopted, effective January 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.502. MOTION FOR RELIEF FROM JUDGMENT.

(A)-(F) [Unchanged.]

(G) Successive Motions.

(1) [Unchanged.]

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

The court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime.

(3) For purposes of subrule (G)(2), "new evidence" includes new scientific evidence. This includes, but is not limited to, shifts in science entailing changes:

(a) in a field of scientific knowledge, including shifts in scientific consensus;

(b) in a testifying expert's own scientific knowledge and opinions; or

(c) in a scientific method on which the relevant scientific evidence at trial was based.

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR.

The prosecutor in a criminal case shall:

(a)-(e) [Unchanged.]

(f) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(g) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

(h) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Comments: [Unchanged.]

Staff Comment: The amendments make several substantive changes in MCR 6.502 regarding postjudgment relief from judgment motions. First, the new language in MCR 6.502(G)(2) inserts a discretionary "actual innocence" waiver provision similar to that in MCR 6.508(D)(3). Further, MCR 6.502(G)(3) is added to clarify that shifts in science are

included in the definition of "new evidence" for purposes of the exemption from the successive motion limitation. Finally, new language is added to MRPC 3.8 to require certain actions by a prosecutor who knows of new, credible, and material evidence creating a reasonable likelihood that defendant is innocent of the crime for which defendant was convicted, or who knows of clear and convincing evidence that shows defendant did not commit the offense. The additional language of MRPC 3.8 is taken from the ABA Model Rules of Professional Conduct 3.8, and includes the "safe harbor" provision as a separate provision of the rule (as opposed to being part of the comments as in the model rule).

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted October 25, 2018, effective immediately (File No. 2017-26)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Canon 3 and Canon 7 of the Michigan Code of Judicial Conduct are adopted, effective immediately.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

CANON 3. A JUDGE SHOULD PERFORM THE DUTIES OF OFFICE IMPARTIALLY AND DILIGENTLY.

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1)-(5) [Unchanged.]

(6) ~~A judge should abstain from public comment about a pending or impending proceeding any court, and should require a similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.~~A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.

(7) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(8) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (6) and (7).

(9) Notwithstanding the restrictions in paragraph (6), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(10) Subject to the requirements of paragraph (6), a judge may respond directly or through a third party to allegations in the media or other forms of communication concerning the judge's conduct in a matter.

(7)-(10) [Unchanged, but renumbered (11)-(14).]

B.-D. [Unchanged.]

CANON 7. A JUDGE OR A CANDIDATE FOR JUDICIAL OFFICE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO JUDICIAL OFFICE.

A. [Unchanged.]

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office:

(a)-(b) [Unchanged.]

(c) ~~should~~shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, ~~or~~ promises, or commitments about ~~of~~ conduct in office ~~other than the faithful and~~ that are inconsistent with the impartial performance of the adjudicative duties of ~~the~~judicial office.

(d) [Unchanged.]

(2)-(3) [Unchanged.]

C. [Unchanged.]

Staff Comment: The amendments of Canon 3 and Canon 7 of the Code of Judicial Conduct incorporate most of the ABA Model Code of Judicial Conduct 2.10 language and clarify its application to public comments made by judges.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted December 3, 2018, effective January 1, 2019 (File Nos. 2002-37 and 2018-20)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of MCR 2.002 are adopted, effective January 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.002. WAIVER ~~OR SUSPENSION~~ OF FEES ~~AND COSTS~~ FOR INDIGENT PERSONS.

(A) Applicability and Scope.

(1) Only an individual ~~natural person~~ is eligible for the waiver ~~or suspension~~ of fees ~~and costs~~ under this rule. A private or public organization is not eligible for a waiver of fees unless an applicable statute provides that no fee(s) shall be required.

(2) Except as provided in subrule (H~~F~~), for the purpose of this rule "fees ~~and costs~~" applies only to ~~filing~~ fees required by ~~law~~ MCL 600.857, MCL 600.880, MCL 600.880a, MCL 600.880b, MCL 600.880c, MCL 600.1027, MCL 600.1986, MCL 600.2529, MCL 600.5756, MCL 600.8371, MCL 600.8420, MCL 700.2517, MCL 700.5104, and MCL 722.717.

(3) A request to waive fees must be filed in each case for which a waiver is requested. A request cannot be applied to multiple cases involving the same individual.

(4) If fees are waived under this rule before judgment, the waiver continues through the date of judgment unless ordered otherwise under subrule (I~~G~~). If fees are waived under this rule postjudgment, the waiver continues through the date of adjudication of the postjudgment proceedings. If jurisdiction of the case is transferred to another court, the order granting the waiver continues in the receiving court according to this rule unless ordered otherwise by the receiving court under subrule (I~~G~~). If an interlocutory appeal is filed in another court, the order granting the waiver continues in the appellate court.

(5) If the case is appealed, the order granting the waiver is void in the appellate court. A request to waive appellate filing fees may be filed in the appellate court in accordance with this rule.

(B) Request for Waiver of Fees. A request to waive fees must accompany the documents the individual is filing with the court. The request must be on a form approved by the State Court Administrative Office entitled "Fee Waiver Request." Except as provided in (J), no additional documentation may be required. The information contained on the form shall be nonpublic. The request must be verified in accordance with MCR 1.109(D)(3)(b) and ~~Execution of Affidavits. An affidavit required by this rule may~~ be signed either

(1) by the individual ~~party~~ in whose behalf the request ~~affidavit~~ is made; or

(2) by a person having personal knowledge of the facts required to be shown, if the individual ~~person~~ in whose behalf the request ~~affidavit~~ is made is unable to sign it because of minority or other disability. ~~The affidavit must recite the minority or other disability.~~

(C) Persons Receiving Public Assistance. If a party shows ~~by ex parte affidavit or otherwise~~ that he or she is receiving any form of means-tested public assistance, the payment of fees ~~and costs~~ as to that party shall be ~~suspended~~waived. For purposes of this rule, means-tested public assistance includes but is not limited to:

(1) Food Assistance Program through the State of Michigan;

(2) Medicaid;

(3) Financial Independence Program through the State of Michigan;

(4) Women, Infants, and Children benefits;

(5) Supplemental Security Income through the federal government; or

(6) Any other federal, state, or locally administered means-tested income or benefit.

The clerk of the court shall certify the waiver on a form approved by the State Court Administrative Office and shall send a copy to the individual.

(D) Representation by a Legal Services Program. If a party is represented by a legal services program that is a grantee of the federal Legal Services Corporation or the Michigan State Bar Foundation, or by a law school clinic that provides services on the basis of indigence, the payment of fees as to that party shall be waived.

The clerk of the court shall certify the waiver on a form approved by the State Court Administrative Office and shall send a copy to the individual.

~~(D)~~(E) Other Indigent Individuals ~~Persons~~. If an individual ~~party~~ shows ~~by ex parte affidavit or otherwise~~ that he or she is unable because of indigenc~~y~~ to pay fees ~~and costs~~, the court shall order those fees ~~and costs either~~ waived ~~or suspended until the conclusion of the litigation~~. For purposes of this rule, indigence is defined as living in a household whose gross household income is under 125% of the federal poverty level.

(F) Denial of a Request to Waive Fees. A judge shall enter an order either granting or denying the request within three business days. If required financial information is not provided in the waiver request, the judge may deny the waiver. An order denying shall indicate the reason for denial. The order granting a request must include a statement that the person for whom fees are waived is required to notify the court when the reason for waiver no longer exists.

(1) The clerk of the court shall send a copy of the order to the individual. If the court denied the request, the clerk shall also send a notice that to preserve the filing date the individual must pay the fees within 14 days from the date the clerk sends notice of the order or the filing will be rejected.

(2) De Novo Review of Order Denying Waiver.

(a) Request for De Novo Review. If the court denies a request for fee waiver, the individual may file a request for de novo review within 14 days of the date of entry of the order. There is no motion fee for the request. A request for de novo review automatically stays the case or preserves the filing date until the review is decided. A de novo review must be held within 14 days of receiving the request.

(b) Review.

(i) If the court holds a hearing on the request for de novo review, it shall be closed and held on the record. The clerk of the court shall serve notice of the review at least 9 days before the time set for the hearing if served by mail, or at least 7 days before the time set for the hearing if served by delivery under MCR 2.107(C)(1) or (2). The Michigan Rules of Evidence do not apply at this hearing.

(ii) If a hearing is held, the individual shall bring documents to verify the statements made in the fee waiver request and request for de novo review. The court may question the individual regarding the statements made in the requests.

(c) Chief Judge Ruling, Judicial Assignment.

(i) In a court having two or more judges, the chief judge shall decide the request for de novo review. In a single-judge court, or if the order denying waiver was issued by the chief judge, the judge shall refer the

request to the state court administrator for assignment to another judge, who shall decide the request for de novo review.

(ii) The court shall enter an order reflecting its decision on the de novo review. If the court denies the request, it shall explain its reasoning in the order.

~~(E)~~(G) Domestic Relations Cases; Payment of Fees ~~and Costs~~ by Spouse.

~~(1)~~ If a party is entitled to relief ~~I~~in an action for divorce, separate maintenance, ~~or~~ annulment, or affirmation of marriage, is qualified for a waiver of filing fees under subrule (C), (D), or (E) and is also entitled to an order requiring the other party to pay attorney fees, the court shall order ~~suspension~~ waiver of payment of those fees ~~and costs~~ and shall require the other party to pay them, unless the other party is also qualified to have filing fees waived under subrule (C) or (D) or (E).~~required to be paid by a party and order that they be paid by the spouse, if that party~~

~~(a) is qualified for a waiver or suspension of fees and costs under subrule (C) or (D),~~

~~(b) is entitled to an order requiring the spouse to pay attorney fees.~~

~~(2) If the spouse is entitled to have the fees and costs waived or suspended under subrule (C) or (D), the fees and costs are waived or suspended for the spouse.~~

~~(F)~~(H) Payment of Service Fees and Costs of Publication for Indigent Individuals ~~Persons~~. If payment of fees ~~and costs~~ has been waived ~~or suspended~~ for an individual ~~party~~ and service of process must be made by an official process server or by publication, the court shall order the service fees or costs of publication paid by the county or funding unit in which the action is pending, if the individual ~~party~~ files ~~submits~~ an ex

parte affidavit stating facts showing the necessity for that type of service of process. If known at the time, the affidavit may be included in or with the request to waive fees.

~~(G)~~(I) Reinstatement of Requirement to Pay ~~for Payment of~~ Fees ~~and Costs~~. If the payment of fees ~~or costs~~ has been waived ~~or suspended~~ under this rule, the court may on its own initiative order the individual ~~person~~ for whom the fees ~~or costs~~ were waived ~~or suspended~~ to pay those fees ~~or costs~~ when, upon a finding of fact, the court determines the reason for the waiver ~~or suspension~~ no longer exists. If an order to reinstate fees is entered, the individual must pay the fees as ordered. If fees are reinstated, the court shall not delay entry of orders or judgments or in any other way delay the progress of the case pending payment of the fees.

(J) Review of Fee Waiver Petitions. Only if a court finds that a request for a fee waiver is incomplete or if a court has a reasonable belief that a request is inaccurate, the court may conduct further inquiries reasonably necessary to prove indigency or financial hardship. Any hearing regarding these further inquiries shall be on the record. The notice of hearing shall indicate the specific issues that are subject to further inquiry.

Staff Comment: This order clarifies and updates MCR 2.002 (regarding determination of indigency for purposes of filing fees) by establishing a more streamlined procedure to be used in an e-Filing (and paper) environment, creating a threshold level of indigence (125% of the federal poverty level) and implementing a de novo review procedure.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted December 5, 2018, effective January 1, 2019 (File No. 2015-20)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of MCR 8.110 is adopted, effective January 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 8.110 CHIEF JUDGE RULE.

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(4) [Unchanged.]

(5) A chief judge may relieve the judge from presiding over some or all of the judge's docket with approval of the state court administrator.

(5)-(7) [Renumbered (6)-(8) but otherwise unchanged.]

(D) [Unchanged.]

Staff comment: The amendment of MCR 8.110 explicitly provides that a chief judge, with approval of the state court administrator, may relieve a judge from presiding over some or all of the judge's caseload. The delegation of such authority to a chief judge does not in any way limit the Supreme Court's authority to exercise "general superintending control over all courts" under Const 1963, art 6, § 4.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted December 12, 2018, effective January 1, 2019 (File No. 2016-46)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 15 of the Rules Concerning the State Bar of Michigan is adopted, effective January 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 15. ADMISSION TO THE BAR.

Section 1. Character and Fitness Committees.

(1)-(20) [Unchanged.]

(21) Every applicant for admission by examination and any other applicant whose application is submitted to the standing committee on character and fitness for evaluation and recommendation shall pay to the State Bar of Michigan a fee of ~~$225~~375 for the character and fitness investigation authorized by this rule. An additional fee of ~~$100~~175 shall be required for character and fitness evaluations related to applications for the February examination that are ~~postmarked~~submitted after November 1, and applications for the July examination that are ~~postmarked~~submitted after March 1.

Section 2. Foreign Attorney; Temporary Permission. [Unchanged.]

Section 3. Procedure for Admission; Oath of Office. [Unchanged.]

BERNSTEIN, J., would not adopt the fee increase amendment.

Staff Comment: The amendment of Rule 15 of the Rules Concerning the State Bar of Michigan (submitted by the SBM Representative

Assembly) increases the fee for Character & Fitness investigations to more accurately reflect the costs of performing the investigations and updates the language to reflect the online application process. According to the Bar, this is the first increase in these fees in more than 15 years.

The staff comment is not authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted January 23, 2019, effective immediately (File Nos. 2002-37 and 2018-20)—REPORTER.

On order of the Court, the following amendment is adopted, effective immediately.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.002. WAIVER OF FEES FOR INDIGENT PERSONS.

(A) Applicability and Scope.

(1) [Unchanged.]

(2) Except as provided in subrule (~~H~~I), for the purpose of this rule "fees" applies only to fees required by MCL 600.857, MCL 600.880, MCL 600.880a, MCL 600.880b, MCL 600.880c, MCL 600.1027, MCL 600.1986, MCL 600.2529, MCL 600.5756, MCL 600.8371, MCL 600.8420, MCL 700.2517, MCL 700.5104, and MCL 722.717.

(3) [Unchanged.]

(4) If fees are waived under this rule before judgment, the waiver continues through the date of judgment unless ordered otherwise under subrule (~~I~~J). If fees are waived under this rule postjudgment, the waiver continues through the date of adjudication of the postjudgment proceedings. If jurisdiction of the case is transferred to another court, ~~the order granting~~

the waiver continues in the receiving court according to this rule unless ordered otherwise by the receiving court under subrule (~~I~~J). If an interlocutory appeal is filed in another court, ~~the order granting~~ the waiver continues in the appellate court.

(5) If the case is appealed, ~~the order granting~~ the waiver is void in the appellate court. A request to waive appellate filing fees may be filed in the appellate court in accordance with this rule.

(B) Request for Waiver of Fees. A request to waive fees must accompany the documents the individual is filing with the court. The request must be on a form approved by the State Court Administrative Office entitled "Fee Waiver Request." Except as provided in (~~J~~K), no additional documentation may be required. The information contained on the form shall be nonpublic. The request must be verified in accordance with MCR 1.109(D)(3)(b) and may be signed either

(1)-(2) [Unchanged.]

(C) Persons Receiving Public Assistance. If a party shows that he or she is receiving any form of means-tested public assistance, the clerk of the court must waive payment of fees as to that party on a form approved by the State Court Administrative Office~~shall be waived~~. For purposes of this rule, means-tested public assistance includes but is not limited to:

(1)-(2) [Unchanged.]

(3) Family~~Financial~~ Independence Program through the State of Michigan;

(4)-(6) [Unchanged.]

The clerk of the court ~~shall certify the waiver on a form approved by the State Court Administrative Of-~~

~~fice and shall send~~ must provide a copy of the signed waiver of fees to the individual. The waiver shall be nonpublic.

(D) Representation by a Legal Services Program. If a party is represented by a legal services program that is a grantee of the federal Legal Services Corporation or the Michigan State Bar Foundation, or by a law school clinic that provides services on the basis of indigence, the clerk of the court must waive payment of fees as to that party ~~shall be waived~~on a form approved by the State Court Administrative Office.

The clerk of the court ~~shall certify the waiver on a form approved by the State Court Administrative Office and shall send~~ must provide a copy of the signed waiver of fees to the individual. The waiver shall be nonpublic.

(E) If the clerk of the court is unable to waive fees under (C) or (D), the clerk shall immediately submit the request for judicial review.

(~~E~~F) Other Indigent Individuals. If an individual shows that he or she is unable because of indigence to pay fees, the court shall order those fees waived. ~~For purposes of this rule,~~The court must waive fees when the individual lives ~~indigence is defined as living~~ in a household ~~whose~~with gross ~~household~~ income ~~is~~ under 125% of the federal poverty ~~level~~guidelines. The court must also waive fees when gross household income is above 125% of the federal poverty guidelines if the payment of fees would constitute a financial hardship on the individual.

(~~F~~G) ~~Denial of a Request to Waive Fees~~Order Regarding a Request to Waive Fees. A judge shall enter an order either granting or denying ~~the request~~a request made under (E) or (F) within three business days and such order shall be nonpublic. If required

financial information is not provided in the waiver request, the judge may deny the waiver. An order denying shall indicate the reason for denial. The order granting a request must include a statement that the person for whom fees are waived is required to notify the court when the reason for waiver no longer exists.

(1) [Unchanged.]

(2) De Novo Review of ~~Order Denying Waiver~~Fee Waiver Denials.

(a) Request for De Novo Review. If the court denies a request for fee waiver, the individual may file a request for de novo review within 14 days of the ~~date of entry of the order~~notice denying the waiver. There is no motion fee for the request. A request for de novo review automatically stays the case or preserves the filing date until the review is decided. A de novo review must be held within 14 days of receiving the request.

(b)-(c) [Unchanged.]

(~~G~~H) Domestic Relations Cases; Payment of Fees by Spouse. If a party entitled to relief in an action for divorce, separate maintenance, annulment, or affirmation of marriage is qualified for waiver of filing fees under subrule (C), (D), or (~~E~~F) and is also entitled to an order requiring the other party to pay attorney fees, the court shall order waiver of payment of those fees and shall require the other party to pay them, unless the other party is also qualified to have filing fees waived under subrule (C) or (D) or (~~E~~F).

(H)-(J) [Relettered (I)-(K) but otherwise unchanged.]

Staff Comment: This order makes corrections and technical changes to the rule and clarifies the existing language. The changes were recommended by the State Bar of Michigan workgroup on Consistent Fee Waivers.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantial determination by this Court.

Adopted March 13, 2019, effective May 1, 2019 (File No. 2016-05)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 2.513 of the Michigan Court Rules is adopted, effective May 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.513. CONDUCT OF JURY TRIAL.

(A) Preliminary Instructions. After the jury is sworn and before evidence is taken, the court shall orally provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be orally instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall also provide each juror with a written copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions.

(B)-(M) [Unchanged.]

(N) Final Instructions to the Jury.

(1) Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must orally instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may orally instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate.

(2) Solicit Questions about Final Instructions. As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations. ~~Upon concluding the final instructions~~After orally delivering the final jury instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate.

If questions arise, the court and the parties shall convene, in the courtroom or by other agreed-upon means. The question shall be read into the record, and the attorneys shall offer comments on an appropriate response. The court may, in its discretion, provide the jury with a specific response to the jury's question, but the court shall respond to all questions asked, even if the response consists of a directive for the jury to continue its deliberations.

(3)-(4) [Unchanged.]

(O)-(P) [Unchanged.]

Staff Comment: The amendment of MCR 2.513 explicitly provides that a court must orally recite its preliminary and final jury instructions

for the jury (in addition to providing them in writing). The amendment clarifies that even though a juror is entitled to a written set of instructions, the judge must still orally instruct the jury. This amendment conforms the rule to the opinion issued by the Court in *People v Traver*.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 13, 2019, effective May 1, 2019 (File No. 2017-15)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Canon 7 of the Code of Judicial Conduct is adopted, effective May 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

CANON 7. A JUDGE OR A CANDIDATE FOR JUDICIAL OFFICE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO JUDICIAL OFFICE.

A. [Unchanged.]

B. Campaign Conduct:

(1) [Unchanged.]

(2) These provisions govern a candidate, including an incumbent judge, for a judicial office:

(a) [Unchanged.]

(b) A candidate may establish committees of responsible persons to secure and manage the expenditure of

funds for the campaign and to obtain public statements of support (including support from lawyers) for the candidacy.

(c) Such committees may solicit and acceptare prohibited from soliciting campaign contributions from the public, including lawyers, as permitted by law.in excess of $100 per lawyer, but may solicit public support from lawyers. It is not a violation of this provision for a committee, in undertaking solicitations that are not directed exclusively to lawyers but may in fact go to lawyers who are members of a group or found on a mailing list, to solicit more than $100 per person, provided that the following disclaimer appears on the letter or on a response card, in print that is at least the same size as the remainder of the print in the letter or the response card:

"Canon 7 of the Michigan Code of Judicial Conduct prohibits a judicial campaign committee from soliciting more than $100 per lawyer. If you are a lawyer, please regard this as informative and not a solicitation for more than $100."

(d)-(g) [Unchanged.]

(3) [Unchanged.]

C. [Unchanged.]

Staff comment: The amendment of Canon 7 of the Code of Judicial Conduct explicitly allows judicial campaign solicitation as permitted by law, eliminates the $100 per lawyer limitation, and removes the disclaimer requirement. This change brings Michigan's canons into conformity with the majority of states that have moved away from solicitation restrictions and instead opted to refer to statutory campaign provisions.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 13, 2019, effective May 1, 2019 (File No. 2018-07)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.993 of the Michigan Court Rules is adopted, effective May 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.993. APPEALS.

(A) The following orders are appealable to the Court of Appeals by right:

(1)-(2) [Unchanged.]

(3) any order required by law to be appealed to the Court of Appeals, ~~and~~

(4) any order involving an Indian child that is subject to potential invalidation under § 39 of the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*. or § 1914 of the Indian Child Welfare Act, 25 USC 1901 *et seq*., which includes, but is not limited to, an order regarding:

(a) recognition of the jurisdiction of a tribal court pursuant to MCL 712B.7, MCL 712B.29, or 25 USC 1911;

(b) transfer to tribal court pursuant to MCL 712B.7 or 25 USC 1911;

(c) intervention pursuant to MCL 712B.7 or 25 USC 1911;

(d) extension of full faith and credit to public acts, records, and judicial proceedings of an Indian tribe pursuant to MCL 712B.7 or 25 USC 1911;

(e) removal of a child from the home, placement into foster care, or continuance of an out-of-home placement pursuant to MCL 712B.9, MCL 712B.15, MCL 712B.25, MCL 712B.29, or 25 USC 1912;

(f) termination of parental rights pursuant to MCL 712B.9, MCL 712B.15, or 25 USC 1912;

(g) appointment of counsel pursuant to MCL 712B.21 or 25 USC 1912;

(h) examination of reports pursuant to MCL 712B.11 or 25 USC 1912;

(i) voluntary consent to or withdrawal of a voluntary consent to a foster care placement or to a termination of parental right pursuant to MCL 712B.13, MCL 712B.25, MCL 712B.27, or 25 USC 1913;

(j) foster care, pre-adoptive, or adoptive placement of an Indian child pursuant to MCL 712B.23; and

(5~~4~~) any final order.

(B)-(C) [Unchanged.]

Staff Comment: The amendment of MCR 3.993, recommended by the State Bar of Michigan, establishes a list of specific orders that can be appealed by right regarding an Indian child subject to a child protective proceeding.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 20, 2019, effective May 1, 2019 (File No. 2002-37)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.109, 2.102, 2.104, 2.106, 2.107, 2.117, 2.119,

2.403, 2.503, 2.506, 2.508, 2.518, 2.602, 2.603, 2.621, 3.101, 3.104, 3.203, 3.205, 3.210, 3.302, 3.607, 3.613, 3.614, 3.705, 3.801, 3.802, 3.805, 3.806, 4.201, 4.202, 4.303, 4.306, 5.001, 5.104, 5.105, 5.107, 5.108, 5.113, 5.117, 5.118, 5.119, 5.120, 5.125, 5.126, 5.132, 5.162, 5.202, 5.203, 5.205, 5.302, 5.304, 5.307, 5.308, 5.309, 5.310, 5.311, 5.313, 5.402, 5.404, 5.405, 5.409, 5.501, and 5.784 and addition of Rule 3.618 of the Michigan Court Rules are adopted, effective May 1, 2019.

[Rule 3.618 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1)-(2) [Unchanged.]

(3) Scope and Applicability.

(a)-(e) [Unchanged.]

(f) For the required case types, attorneys must electronically file documents in courts where electronic filing has been implemented. All other filers are required to electronically file documents only in courts that have been granted approval to mandate electronic filing by the State Court Administrative Office under AO 2019-XX.

(4) [Unchanged.]

(5) Electronic-Filing Process.

(a) [Unchanged.]

(b) Time and Effect of Electronic Filing. A document submitted electronically is deemed filed with the court when the transmission to the electronic-filing system is completed and the required filing fees have been paid or waived. If a document is submitted with a request to waive the filing fees, no fees will be charged at the time of filing and the document is deemed filed on the date the document was submitted to the court. A transmission is completed when the transaction is recorded as prescribed in subrule (c). Regardless of the date a filing is accepted by the clerk of the court, the date of filing is the date submitted. Electronic filing is not restricted by the operating hours of a court and any document submitted at or before 11:59 p.m. of a business day is deemed filed on that business day. Any document submitted on a ~~weekend~~Saturday, Sunday, legal holiday, or other day on which the court is closed pursuant to court order~~court holiday~~ is deemed filed on the next business day.

(c)-(d) [Unchanged.]

(6)-(7) [Unchanged.]

RULE 2.102. SUMMONS; EXPIRATION OF SUMMONS; DISMISSAL OF ACTION FOR FAILURE TO SERVE.

(A) [Unchanged.]

(B) Form. A summons must be issued "In the name of the people of the State of Michigan," under the seal of the court that issued it. It must be directed to the defendant, and include

(1)-(2) [Unchanged.]

(3) the ~~file~~case number,

(4)-(11) [Unchanged.]

(C) [Unchanged.]

(D) Expiration. A summons expires 91 days after the date the ~~complaint is filed~~summons is issued. However, within those 91 days, on a showing of due diligence by the plaintiff in attempting to serve the original summons, the judge to whom the action is assigned may order a second summons to issue for a definite period not exceeding 1 year from the date the ~~complaint is filed~~summons is issued. If such an extension is granted, the new summons expires at the end of the extended period. The judge may impose just conditions on the issuance of the second summons. Duplicate summonses issued under subrule (A) do not extend the life of the original summons. The running of the 91-day period is tolled while a motion challenging the sufficiency of the summons or of the service of the summons is pending.

(E)-(G) [Unchanged.]

RULE 2.104. PROCESS; PROOF OF SERVICE.

(A) Requirements. Proof of service may be made by

(1)-(2) [Unchanged.]

(3) a~~n affidavit stating~~written statement of the facts of service, verified under MCR 1.109(D)(3). The statement shall includ~~ing~~ the manner, time, date, and place of service, and indicat~~ing~~ the process server's official capacity, if any.

The place of service must be described by giving the address where the service was made or, if the service was not made at a particular address, by another description of the location.

(B)-(C) [Unchanged.]

RULE 2.106. NOTICE BY POSTING OR PUBLICATION.

(A)-(F) [Unchanged.]

(G) Proof of Service. Service of process made pursuant to this rule may be proven as follows:

(1) [Unchanged.]

(2) Posting must be proven by a~~n affidavit~~verified statement of the person designated in the order under subrule (E) attesting that a copy of the order was posted for the required time in the courthouse in a conspicuous place open to the public and in the other places as ordered by the court.

(3) Mailing must be proven by ~~affidavit~~a verified statement. The ~~affiant~~person signing the verified statement must attach a copy of the order as mailed, and a return receipt.

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER DOCUMENTS.

(A) Service; When Required.

(1) Unless otherwise stated in this rule, every party who has filed a pleading, an appearance, or a motion must be served with a copy of every ~~paper~~document later filed in the action. A nonparty who has filed a motion or appeared in response to a motion need only be served with ~~papers~~documents that relate to that motion.

(2) Except as provided in MCR 2.603, after a default is entered against a party, further service of ~~papers~~documents need not be made on that party unlesshe or she has filed an appearance or a written demand for service of ~~papers~~documents. However, a pleading that states a new claim for relief against a party in default must be served in the manner provided by MCR 2.105.

(3) [Unchanged.]

(4) All ~~papers~~documents filed on behalf of a defendant must be served on all other defendants not in default.

(B) Service on Attorney or Party.

(1) Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:

(a)-(b) [Unchanged.]

(c) After a final judgment or final order has been entered and the time for an appeal of right has passed, ~~papers~~documents must be served on the party unless the rule governing the particular postjudgment procedure specifically allows service on the attorney;

(d) [Unchanged.]

(e) If an attorney files a notice of limited appearance under MCR 2.117 on behalf of a self-represented party, service of every ~~paper~~document later filed in the action must continue to be made on the party, and must also be made on the limited scope attorney for the duration of the limited appearance. At the request of the limited scope attorney, and if circumstances warrant, the court may order service to be made only on the party.

(2) If two or more attorneys represent the same party, service of ~~papers~~documents on one of the attorneys is sufficient. An attorney who represents more than one party is entitled to service of only one copy of a ~~paper~~document.

(3) If a party prosecutes or defends the action on his or her own behalf, service of ~~papers~~documents must be made on the party in the manner provided by subrule (C).

(C) Manner of Service. Except under MCR 1.109(G)(6)(a), ~~S~~service of a copy of a ~~paper~~document on an attorney must be made by delivery or by mailing

to the attorney at his or her last known business address or, if the attorney does not have a business address, then to his or her last known residence address. Except under MCR 1.109(G)(6)(a), Sservice on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings.

(1) Delivery to Attorney. Delivery of a copy to an attorney within this rule means

(a) handing it to the attorney personally, serving it electronically under MCR 1.109(G)(6)(a), or, if agreed to by the parties, e-mailing it to the attorney as allowed under MCR 2.107(C)(4);

(b)-(c) [Unchanged.]

(2) Delivery to Party. Delivery of a copy to a party within this rule means

(a) handing it to the party personally, serving it electronically under MCR 1.109(G)(6)(a), or, if agreed to by the parties, e-mailing it to the party as allowed under MCR 2.107(C)(4); or

(b) [Unchanged.]

(3) [Unchanged.]

~~(4) E-mail. Some or all of the parties may agree to e-mail service among themselves by filing a stipulation in that case. Some or all of the parties may agree to e-mail service by a court by filing an agreement with the court to do so. E-mail service shall be subject to the following conditions:~~

~~(a) The stipulation or agreement for service by e-mail shall set forth the e-mail addresses of the parties or attorneys that agree to e-mail service, which shall include the same e-mail address currently on file with the State Bar of Michigan. If an attorney is not a member of the State Bar of Michigan, the e-mail address shall be the e-mail address currently on file~~

~~with the appropriate registering agency in the state of the attorney's admission. Parties and attorneys who have stipulated or agreed to service by e-mail under this subsection shall immediately notify all other parties and the court if the party's or attorney's e-mail address changes.~~

~~(b) The parties shall set forth in the stipulation or agreement all limitations and conditions concerning e-mail service, including but not limited to:~~

~~(i) the maximum size of the document that may be attached to an e-mail;~~

~~(ii) designation of exhibits as separate documents;~~

~~(iii) the obligation (if any) to furnish paper copies of e-mailed documents; and~~

~~(iv) the names and e-mail addresses of other individuals in the office of an attorney of record designated to receive e-mail service on behalf of a party.~~

~~(c) Documents served by e-mail must be in PDF format or other format that prevents the alteration of the document contents.~~

~~(d) A paper served by e-mail that an attorney is required to sign may include the attorney's actual signature or a signature block with the name of the signatory accompanied by "s/" or "/s/." That designation shall constitute a signature for all purposes, including those contemplated by MCR 2.114(C) and (D).~~

~~(e) Each e-mail that transmits a document shall include a subject line that identifies the case by court, party name, case number, and the title or legal description of the document(s) being sent.~~

~~(f) An e-mail transmission sent after 4:30 p.m. Eastern Time shall be deemed to be served on the next day that is not a Saturday, Sunday, or legal holiday.~~

~~Service by e-mail under this subrule is treated as service by delivery under MCR 2.107(C)(1).~~

~~(g) A party may withdraw from a stipulation or agreement for service by e-mail if that party notifies the other party or parties and the court in writing at least 28 days in advance of the withdrawal.~~

~~(h) Service by e-mail is complete upon transmission, unless the party making service learns that the attempted service did not reach the e-mail address of the intended recipient. If an e-mail is returned as undeliverable, the party, attorney, or court must serve the paper or other document by regular mail under MCR 2.107(C)(3), and include a copy of the return notice indicating that the e-mail was undeliverable. A party, attorney, or court must also retain a notice that the e-mail was undeliverable.~~

~~(i) The e-mail sender shall maintain an archived record of sent items that shall not be purged until the conclusion of the case, including the disposition of all appeals.~~

(4) Alternative Electronic Service.

(a) Except as provided by MCR 1.109(G)(6)(a)(ii), the parties may agree to alternative electronic service among themselves by filing a stipulation in that case. Some or all of the parties may also agree to alternative electronic service of notices and court documents in a particular case by a court or a friend of the court by filing an agreement with the court or friend of the court respectively. Alternative electronic service may be by any of the following methods:

(i) e-mail,

(ii) text message, or

(iii) alert consisting of an e-mail or text message to log into a secure website to view notices and court papers.

(b) Obligation to Provide and Update Information.

(i) The agreement for alternative electronic service shall set forth the e-mail addresses or phone numbers for service. Attorneys who agree to e-mail service shall include the same e-mail address currently on file with the State Bar of Michigan. If an attorney is not a member of the State Bar of Michigan, the e-mail address shall be the e-mail address currently on file with the appropriate registering agency in the state of the attorney's admission. Parties or attorneys who have agreed to alternative electronic service under this subrule shall immediately notify, as required, the court or the friend of the court if the e-mail address or phone number for service changes.

(ii) The agreement for service by text message or text message alert shall set forth the phone number for service. Parties or attorneys who have agreed to service by text message or text message alert under this subrule shall immediately notify, as required, the court or the friend of the court if the phone number for service changes.

(c) The party or attorney shall set forth in the agreement all limitations and conditions concerning e-mail or text message service, including but not limited to:

(i) the maximum size of the document that may be attached to an e-mail or text message,

(ii) designation of exhibits as separate documents,

(iii) the obligation (if any) to furnish paper copies of e-mailed or text message documents, and

(iv) the names and e-mail addresses of other individuals in the office of an attorney of record designated to receive e-mail service on behalf of a party.

(d) Documents served by e-mail or text message must be in PDF format or other format that prevents the alteration of the document contents. Documents served by alert must be in PDF format or other format for which a free downloadable reader is available.

(e) A document served by alternative electronic service that the court or friend of the court or his or her authorized designee is required to sign may be signed in accordance with MCR 1.109(E).

(f) Each e-mail or text message that transmits a document or provides an alert to log in to view a document shall identify in the e-mail subject line or at the beginning of the text message the name of the court, case name, case number, and the title of each document being sent.

(g) An alternative electronic service transmission sent at or before 11:59 p.m. shall be deemed to be served on that day. If the transmission is sent on a Saturday, Sunday, legal holiday, or other day on which the court is closed pursuant to court order, it is deemed to be served on the next business day.

(h) A party or attorney may withdraw from an agreement for alternative electronic service by notifying the party or parties, court, and the friend of the court, as appropriate, in writing and shall take effect immediately.

(i) Alternative electronic service is complete upon transmission, unless the party, court, or friend of the court making service learns that the attempted service did not reach the intended recipient. If an alternative electronic service transmission is undeliver-

able, the entity responsible for serving the document must serve the document by regular mail under MCR 2.107(C)(3) or by delivery under MCR 2.107(C)(1) or (2), and include a copy of the return notice indicating that the electronic transmission was undeliverable. The court or friend of the court must also retain a notice that the electronic transmission was undeliverable.

(j) The party, court, or friend of the court shall maintain an archived record of sent items that shall not be purged until a judgment or final order is entered and all appeals have been completed.

(k) This rule does not require the court or the friend of the court to create functionality it does not have nor accommodate more than one standard for alternative electronic service.

(l) The party or attorney requesting electronic service under this subrule is required to submit a request to initiate, update, modify, or withdraw from electronic service to the court independently from the friend of the court office.

(D) [Unchanged.]

(E) Service Prescribed by Court. When service of ~~papers~~documents after the original complaint cannot reasonably be made because there is no attorney of record, because the party cannot be found, or for any other reason, the court, for good cause on ex parte application, may direct in what manner and on whom service may be made.

(F) Numerous Parties. In an action in which there is an unusually large number of parties on the same side, the court on motion or on its own initiative may order that

(1) they need not serve their ~~papers~~documents on each other;

(2)-(4) [Unchanged.]

A copy of the order must be served on all parties in the manner the court directs.

RULE 2.117. APPEARANCES.

(A) Appearance by Party.

(1) A party may appear in an action by filing a notice to that effect or by physically appearing before the court for that purpose. In the latter event, the party must promptly file a written appearance and serve it on all persons entitled to service. A written appearance must comply with the caption requirements in MCR 1.109(D)(1)(b). ~~The party's address and telephone number must be included in the appearance.~~

(2) Filing an appearance without taking any other action toward prosecution or defense of the action neither confers nor enlarges the jurisdiction of the court over the party. An appearance entitles a party to ~~receive copies of~~be served with all ~~pleadings and papers~~documents as provided by MCR 2.107(A). In all other respects, the party is treated as if the appearance had not been filed.

(B) Appearance by Attorney.

(1) [Unchanged.]

(2) Notice of Appearance.

(a) If an appearance is made in a manner not involving the filing of a ~~paper~~document with the court, the attorney must promptly file a written appearance and serve it on the parties entitled to service. The written appearance must comply with the caption

requirements in MCR 1.109(D)(1)(b). ~~The attorney's address and telephone number must be included in the appearance.~~

(b) If an attorney files an appearance, but takes no other action toward prosecution or defense of the action, the appearance entitles the attorney to ~~service of pleadings and papers~~be served with all documents as provided by MCR 2.107(A).

(c)-(d) [Unchanged.]

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other ~~paper~~document filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a ~~paper~~document in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered, or a confirming notice of withdrawal of a notice of limited appearance is filed as provided by subrule (C)(3). This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the party.

(b) [Unchanged.]

(C) [Unchanged.]

(D) Nonappearance of Attorney Assisting in Document Preparation. An attorney who assists in the preparation of pleadings or other ~~papers~~documents without signing them, as authorized in MRPC 1.2(b), has not filed an appearance and shall not be deemed to have done so. This provision shall not be construed to prevent the court from investigating issues concerning the preparation of such a ~~paper~~document.

(E) Service of Documents After Removal of Appearance. If an attorney has filed a limited appearance or

the attorney is removed from the case for any other reason, the attorney shall not continue to be served with documents in the case after the limited appearance ends or after an order is entered removing the attorney from the case.

RULE 2.119. MOTION PRACTICE.

(A) [Unchanged.]

(B) Form of Affidavits.

(1) [Unchanged.]

(2) Sworn or certified copies of all ~~papers~~documents or parts of ~~papers~~documents referred to in an affidavit must be attached to the affidavit unless the ~~papers or copies~~documents:

(a)-(d) [Unchanged.]

(C) Time for Service and Filing of Motions and Responses.

(1) Unless a different period is set by these rules or by the court for good cause, a written motion (other than one that may be heard ex parte), notice of the hearing on the motion, and any supporting brief or affidavits must be served as follows:

(a) at least 9 days before the time set for the hearing, if served by first-class mail, or

(b) at least 7 days before the time set for the hearing, if served by delivery under MCR 2.107(C)(1) or (2) or MCR 1.109(G)(6)(a).

(2) Unless a different period is set by these rules or by the court for good cause, any response to a motion (including a brief or affidavits) required or permitted by these rules must be served as follows:

(a) at least 5 days before the hearing, if served by first-class mail, or

(b) at least 3 days before the hearing, if served by delivery under MCR 2.107(C)(1) or (2) or MCR 1.109(G)(6)(a).

(3)-(4) [Unchanged.]

(D)-(G) [Unchanged.]

RULE 2.403. CASE EVALUATION.

(A)-(J) [Unchanged.]

(K) Decision.

(1) Within 14 days after the hearing, the panel will make an evaluation and ~~notify~~submit the evaluation to the ADR clerk. If an evaluation is made immediately following the hearing, the panel will provide a copy to the attorney for each party of its evaluation in writing. If an evaluation is not made immediately following the hearing, the evaluation must be served by the ADR clerk on each party within 14 days after the hearing. If an award is not unanimous, the evaluation must so indicate.

(2)-(5) [Unchanged.]

(L)-(O) [Unchanged.]

RULE 2.503. ADJOURNMENTS.

(A)-(C) [Unchanged.]

(D) Order for Adjournment; Costs and Conditions.

(1) [Unchanged.]

(2) In granting an adjournment, the court may impose costs and conditions. When an adjournment is granted conditioned on payment of costs, the costs may be taxed summarily to be paid on demand of the adverse party or the adverse party's attorney, and the adjournment may be vacated if nonpayment is shown by ~~affidavit~~written statement verified under MCR 1.109(D)(3).

(E)-(F) [Unchanged.]

RULE 2.506. SUBPOENA; ORDER TO ATTEND.

(A) [Unchanged.]

(B) Authorized Signatures.

(1) [Unchanged.]

(2) For the purpose of this subrule, an authorized signature includes but is not limited to signatures written by hand, printed, stamped, typewritten, engraved, photographed, ~~or~~ lithographed, or executed under MCR 1.109(E)(4).

(C)-(I) [Unchanged.]

RULE 2.508. JURY TRIAL OF RIGHT.

(A) [Unchanged.]

(B) Demand for Jury.

(1) A party may demand a trial by jury of an issue as to which there is a right to trial by jury by filing a written demand for a jury trial within 28 days after the filing of the answer or a timely reply. The demand for jury must be filed as a separate document.~~A party may include the demand in a pleading if notice of the demand is included in the caption of the pleading.~~ The jury fee provided by law must be paid at the time the demand is filed.

(2)-(3) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 2.518. RECEIPT AND RETURN OR DISPOSAL OF EXHIBITS.

(A) Receipt of Exhibits. Except as otherwise required by statute or court rule, materials that are

~~intended to be used as evidence at or during a trial shall not be filed with the clerk of the court, but shall be submitted to the judge for introduction into evidence as exhibits. Exhibits introduced into evidence at or during court proceedings shall be received and maintained as provided by Michigan Supreme Court trial court case file~~records management standards. As defined in MCR 1.109, exhibits received and accepted into evidence under this rule are not court records.

(B)-(C) [Unchanged.]

RULE 2.602. ENTRY OF JUDGMENTS AND ORDERS.

(A) Signing; Statement; Date of Entry.

(1) Except as provided in this rule and in MCR 2.603, all judgments and orders must be in writing, signed by the court, and dated with the date they are signed.

(2)-(3) [Unchanged.]

(4) Where electronic filing is implemented, judgments and orders must be issued under the seal of the court.

(B) Procedure of Entry of Judgments and Orders. An order or judgment shall be entered by one of the following methods:

(1)-(2) [Unchanged.]

(3) Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the notice and proof of service along with~~original of~~ the proposed judgment or order ~~and proof of its service on the other parties~~.

(a) If no written objections are filed within 7 days of the date of service of the notice, the ~~clerk shall submit the judgment or order to the court, and the court~~judge shall ~~then~~ sign ~~it~~the judgment or order if, in the court's determination, it comports with the court's decision. If the proposed judgment or order does not comport with the decision, the court shall direct the clerk to notify the parties to appear before the court on a specified date for settlement of the matter.

(b)-(c) [Unchanged.]

(d) The court must schedule the hearing upon filing of the first objection, and the party filing the objection must serve the notice of hearing under subrule (B)(3)(c). Other parties to the action may file objections with the court through the end of the 7-day period. The court must schedule a hearing for all objections within 14 days after the first objection is filed or as soon as is practical afterward.

(4) A party may prepare a proposed judgment or order and notice it for settlement before the court. Pursuant to MCR 2.119(G)(3)(b), a motion fee may not be charged.

(C) [Unchanged.]

(D) ~~Filing~~ Placement in Case File. The ~~original of the~~signed judgment or order must be placed in the case file.

(E) [Unchanged.]

RULE 2.603. DEFAULT AND DEFAULT JUDGMENT.

(A) Entry of Default; Notice; Effect.

(1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is ~~made to appear by affidavit or otherwise~~verified in the

manner prescribed by MCR 1.109(D)(3) and filed with the court in the request for default, the clerk must enter the default of that party.

(2) Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.

~~(a) In the district court, the court clerk shall send the notice.~~

~~(b) In all other courts, t~~The notice must be sent by the party who sought entry of the default. Proof of service and a copy of the notice must be filed with the court.

(3) ~~Once~~After the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612.

(B) Default Judgment.

(1) [Unchanged.]

(2) Default Judgment Entered by Clerk. On written request of the plaintiff ~~supported by an affidavit~~verified under MCR 1.109(D)(3) as to the amount due, the clerk may sign and enter a default judgment for that amount and costs against the defendant, if

(a) [Unchanged.]

(b) the default was entered because the defendant failed to appear; ~~and~~

(c) the defaulted defendant is not an infant or incompetent person; and

(d) [Unchanged.]

(3) [Unchanged.]

(4) Notice of Entry of Default Judgment. The ~~court clerk must promptly mail notice of entry of a default judgment to~~party who sought entry of the default judgment must promptly serve all parties with the default judgment. The ~~notice to the defendant~~default judgment shall be mailed to the defendant's last known address or the address of the place of service. ~~The clerk must keep a record that notice was given~~Proof of service must be filed with the court.

(C) [Unchanged.]

(D) Setting Aside Default or Default Judgment.

(1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and ~~an affidavit~~a statement of facts showing a meritorious defense, verified in the manner prescribed by MCR 1.109(D)(3), is filed.

(2)-(4) [Unchanged.]

(E) [Unchanged.]

RULE 2.621. PROCEEDINGS SUPPLEMENTARY TO JUDGMENT.

(A)-(G) [Unchanged.]

(H) Appeal; Procedure; Bonds. A final order entered in a supplementary proceeding may be appealed in the usual manner. The appeal is governed by the provisions of chapter 7 of these rules except as modified by this subrule.

(1)-(2) [Unchanged.]

(3) If the order appealed from directs the assignment or delivery of ~~papers or~~ documents by the appellant, the ~~papers~~documents must be delivered to the clerk of the court in which the proceeding is pending or placed in the hands of an officer or receiver, as the judge who

entered the order directs, to await the appeal, subject to the order of the appellate courts.

(4) [Unchanged.]

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(G) [Unchanged.]

(H) Disclosure. The garnishee shall ~~mail or deliver to~~file with the court~~,~~ and deliver to the plaintiff~~,~~ and ~~the~~ defendant, a verified disclosure within 14 days after being served with the writ.

(1)-(2) [Unchanged.]

(I)-(T) [Unchanged.]

RULE 3.104. INSTALLMENT PAYMENT ORDERS.

(A) Motion for Installment Payment Order. A party against whom a money judgment has been entered may move for entry of an order permitting the judgment to be paid in installments in accordance with MCL 600.6201 *et seq*. A copy of the motion must be served on the plaintiff~~, by the clerk of the court in district court and~~ by the party who filed the objection ~~in circuit or probate court~~.

(B) Consideration of Motion. The motion will be granted without further hearing unless the plaintiff files, and serves on the defendant, written objections within 14 days after the service date of the defendant's motion. If objections are filed, the clerk must promptly present the motion and objections to the court. The court will decide the motion based on the ~~papers~~documents filed or notify the parties that a hearing will be required. Unless the court schedules the hearing, the moving party is responsible for noticing the motion for hearing.

(C)-(D) [Unchanged.]

RULE 3.203. SERVICE OF NOTICE AND COURT ~~PAPERS~~DOCUMENTS in DOMESTIC RELATIONS CASES.

(A) Manner of Service. Unless otherwise required by court rule or statute, the summons and complaint must be served pursuant to MCR 2.105. In cases in which the court retains jurisdiction

(1) [Unchanged.]

(2) court ~~papers~~documents and notice for which the statute or court rule does not specify the manner of service must be served as provided in MCR 2.107, except that service by mail shall be to a party's last known mailing address.

(3) Alternative Electronic Service

(a) A party or an attorney may file an agreement with the friend of the court to authorize the friend of the court to serve notices and court papers on the party or attorney in accordance with MCR 2.107(C)(4).~~by any of the following methods:~~

~~(i) e-mail;~~

~~(ii) text message;~~

~~(iii) sending an e-mail or text message alert to log into a secure website to view notices and court papers.~~

~~(b) Obligation to Provide and Update Information~~

~~(i) The agreement for service by e-mail or e-mail alert shall set forth the e-mail addresses for service. Attorneys who agree to e-mail service shall include the same email address currently on file with the State Bar of Michigan. If an attorney is not a member of the State Bar of Michigan, the e-mail address shall be the e-mail address currently on file with the appropriate registering agency in the state of the attorney's admission. Parties or attorneys who have agreed to service by e-mail or email alert under this subsection shall im-~~

~~mediately notify the friend of the court if the e-mail address for service changes.~~

~~(ii) The agreement for service by text message or text message alert shall set forth the phone number for service. Parties or attorneys who have agreed to service by text message or text message alert under this subsection shall immediately notify the friend of the court if the phone number for service changes.~~

~~(c) The party or attorney shall set forth in the agreement all limitations and conditions concerning e-mail or text message service, including but not limited to:~~

~~(i) the maximum size of the document that may be attached to an e-mail or text message;~~

~~(ii) designation of exhibits as separate documents;~~

~~(iii) the obligation (if any) to furnish paper copies of emailed or text message documents; and\so~~

~~(iv) the names and e-mail addresses of other individuals in the office of an attorney of record designated to receive e-mail service on behalf of a party.~~

~~(d) Documents served by e-mail or text message must be in PDF format or other format that prevents the alteration of the document contents. Documents served by alert must be in PDF format or other format for which a free downloadable reader is available.~~

~~(e) A paper served by alternative electronic service that the friend of the court or an authorized designee is required to sign may include the actual signature or a signature block with the name of the signatory accompanied by "s/" or "/s/." That designation shall constitute a signature for all purposes, including those contemplated by MCR 2.114(C) and (D).~~

~~(f) Each e-mail or text message that transmits a document or provides an alert to log in to view a~~

~~document shall identify in the e-mail subject line or at the beginning of the text message the case by court, party name, case number, and the title or legal description of the document(s) being sent.~~

~~(g) An alternative electronic service transmission sent after 4:30 p.m. Eastern Time shall be deemed to be served on the next day that is not a Saturday, Sunday, or legal holiday. Service under this subrule is treated as service by delivery under MCR 2.107(C)(1).~~

~~(h) A party or attorney may withdraw from an agreement for alternative electronic service by notifying the friend of the court in writing at least 28 days in advance of the withdrawal.~~

~~(i) Alternative electronic service is complete upon transmission, unless the friend of the court learns that the attempted service did not reach the intended recipient. If an alternative electronic service transmission is undeliverable, the friend of the court must serve the paper or other document by regular mail under MCR 2.107(C)(3), and include a copy of the return notice indicating that the electronic transmission was undeliverable. The friend of the court must also retain a notice that the electronic transmission was undeliverable.~~

~~(j) The friend of the court shall maintain an archived record of sent items that shall not be purged until a judgment or final order is entered and all appeals have been completed.~~

~~(k) This rule does not require the friend of the court to create functionality it does not have nor accommodate more than one standard for alternative electronic service.~~

(B)-(C) [Unchanged.]

(D) Administrative Change of Address. The friend of the court office may change a party's address admin-

istratively pursuant to the policy established by the state court administrator for that purpose when:

(1) [Unchanged.]

(2) notices and court ~~papers~~documents are returned to the friend of the court office as undeliverable or the friend of the court determines that a federal automated database has determined that mail is not deliverable to the party's listed address.

(E) Service on Nonparties. Notice to a nonparty must be provided as set forth in the statute requiring the notice. Absent statutory direction, the notice may be provided by regular mail. Absent statutory direction, court ~~papers~~documents initiating an action against nonparties to enforce a notice must be served in the same manner as a summons and complaint pursuant to MCR 2.105.

(F) Confidential Addresses. When a court order makes a party's address confidential, the party shall provide an alternative address for service of notice and court ~~papers~~documents.

(G) Notice to Friend of the Court. Except where electronic filing is implemented, ~~I~~if a child of the parties or a child born during the marriage is under the age of 18, or if a party is pregnant, or if child support or spousal support is requested, the parties must provide the friend of the court with a copy of all pleadings and other ~~papers~~documents filed in the action. The copy must be marked "friend of the court" and submitted to the court clerk at the time of filing. The court clerk must send the copy to the friend of the court. Where electronic filing is implemented, the court and the friend of the court shall determine the manner in which the court will make pleadings and other documents filed in the action available to the friend of the court. The court and

friend of the court shall not require the parties to provide paper copies of electronically filed pleadings.

(H) Notice to Prosecuting Attorney. In an action for divorce or separate maintenance in which a child of the parties or a child born during the marriage is under the age of 18, or if a party is pregnant, the plaintiff must serve a copy of the summons and complaint on the prosecuting attorney when required by law. ~~Service must be made at the time of filling by providing the court clerk with an additional copy marked "prosecuting attorney". The court clerk must send the copy to the prosecuting attorney.~~

(I)-(J) [Unchanged.]

RULE 3.205. PRIOR AND SUBSEQUENT ORDERS AND JUDGMENTS AFFECTING MINORS.

(A) [Unchanged.]

(B) Notice to Prior Court, Friend of the Court, Juvenile Officer, and Prosecuting Attorney.

(1) [Unchanged.]

(2) If a minor is known to be subject to the prior continuing jurisdiction of a Michigan court, the plaintiff or other initiating party must ~~mail written~~send notice of proceedings in the subsequent court to ~~the attention of~~

(a)-(b) [Unchanged.]

(3) The notice must be ~~mailed~~sent at least 21 days before the date set for hearing. If the fact of continuing jurisdiction is not then known, notice must be ~~given~~sent immediately when it becomes known.

(4) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 3.210. HEARINGS AND TRIALS.

(A) [Unchanged.]

(B) Default Cases.

(1) [Unchanged.]

(2) Entry of Default.

(a) A party may request the entry of a default of another party for failure to plead or otherwise defend~~.~~ ~~Upon presentation of an affidavit~~ by ~~a party~~ asserting facts setting forth proof of service and failure to plead or otherwise defend in a written request verified under MCR 1.109(D)(3). On filing of the request, the clerk must enter a default of the party.

(b)-(d) [Unchanged.]

(e) A party in default must be served with the notice of default and a copy of every ~~paper~~document later filed in the case as provided by MCR 3.203, and the person serving the notice or other ~~paper~~document must file a proof of service with the court.

(3)-(7) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 3.302. SUPERINTENDING CONTROL.

(A)-(D) [Unchanged.]

(E) Procedure for Superintending Control in Circuit Court.

(1)-(2) [Unchanged.]

(3) Issuance of Order; Dismissal.

(a)-(b) [Unchanged.]

(c) The court may require in an order to show cause that additional records and ~~papers~~documents be filed.

(d) [Unchanged.]

RULE 3.607. PROCEEDINGS TO RESTORE LOST RECORDS OR ~~PAPERS~~DOCUMENTS IN COURTS OF RECORD.

(A)-(D) [Unchanged.]

RULE 3.613. CHANGE OF NAME.

(A)-(B) [Unchanged.]

(C) Notice to Noncustodial Parent. Service on a noncustodial parent of a minor who is the subject of a petition for change of name shall be made in the following manner.

(1) Address Known. If the noncustodial parent's address or whereabouts is known, that parent shall be served with a copy of the petition and a notice of hearing at least 14 days before the hearing in a manner prescribed by MCR 2.107(C).

(2) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 3.614. HEALTH THREATS TO OTHERS.

(A) [Unchanged.]

(B) Service of ~~Papers~~Documents. The moving party is responsible for service when service is required.

(C)-(E) [Unchanged.]

RULE 3.618. EMANCIPATION OF MINOR.

(A) Interested Persons. The persons interested in a petition for emancipation of a minor are

(1) the minor,

(2) parents of the minor,

(3) the affiant on an affidavit supporting emancipation, and

(4) any guardian or conservator.

(B) Summons.

(1) A summons in an emancipation proceeding must be served on an interested person at least 14 days before the date of hearing unless the interested person has waived his or her right to service.

(2) The summons must direct the person to whom it is addressed to appear at a time and place specified by the court and must identify the nature of hearing.

(C) Manner of Serving Summons and Petition.

(1) Except as provided in subrule (C)(2), a summons and petition for emancipation must be served by personal service.

(2) If service of the summons and petition cannot be made under subrule (C)(1) because the whereabouts of an interested person could not be ascertained after diligent inquiry, the petitioner must file proof of the efforts made to locate the interested person in a statement verified under MCR 1.109(D)(3). If the court finds, on reviewing the statement, that a reasonable attempt was made, the court may issue an ex parte order directing another manner of service reasonably calculated to give notice of the proceedings, including notice by publication under subrule (3).

(3) Service by Publication.

(a) Requirements. A notice of hearing or other notice required to be made by publication must be published in a newspaper as defined by MCR 2.106(F) at least one time 21 days before the date of hearing. Publication shall be in the county in which the court is located.

(b) Contents of Notice. The published notice must include the name of the individual to whom the notice is given, a statement describing the nature of the hearing, and a statement that the hearing may affect the individual's interest in the matter. If an interested person has once been served by publication, notice is only required on an interested person whose address is known or becomes known during the proceedings.

(c) Service of Notice. A copy of the notice shall be mailed to the individual to whom the notice is given at

his or her last known address. If the last known address of the individual cannot be ascertained after diligent inquiry, mailing a copy of the notice is not required.

(d) Proof of service under this subrule shall be made according to MCR 2.106(G).

(D) Time of Service.

(1) A summons shall be personally served at least 14 days before hearing on a petition of emancipation, except as allowed under subrule (C)(2).

(2) If the summons is served by registered mail, it must be sent at least 21 days before hearing if the interested person to be served resides in Michigan, or at least 28 days before hearing if the interested person to be served resides outside of Michigan.

(E) Other Service. The clerk of the court shall serve an order issued by the court. If notice of the petition and hearing was given to an interested person by publication, a copy of an order issued by the court need not be served on that interested person.

(F) Proof of Service.

(1) Summons and Petition. Proof of service of the summons and petition must be made in the manner provided in MCR 2.104(A).

(2) Other Documents. Proof of service of other documents permitted or required to be served under this rule must be made in the manner provided in MCR 2.107(D).

RULE 3.705. ISSUANCE OF PERSONAL PROTECTION ORDERS.

(A) Ex Parte Orders.

(1) The court must rule on a request for an ex parte order within ~~24 hours~~one business day of the filing date of the petition.

(2)-(5) [Unchanged.]

(B)-(C) [Unchanged.]

RULE 3.801. ~~PAPERS~~DOCUMENTS, EXECUTION.

(A)-(B) [Unchanged.]

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A) Service of ~~Papers~~Documents.

(1) [Unchanged.]

(2) Notice of a petition to identify a putative father and to determine or terminate his rights, or a petition to terminate the rights of a noncustodial parent, must be served on the individual or the individual's attorney in the manner provided in:

(a) MCR ~~5.105(B)(1)(a) or (b)~~2.107(C)(1) or (2), or

(b) MCR 2.105(A)(2), but service is not made for purpose of this subrule until the individual or the individual's attorney receives the notice or petition.

(3) [Unchanged.]

(4) Except as provided in subrules (B) and (C), all other ~~papers~~documents may be served by mail under MCR 2.107(C)(3), e-mail under MCR 2.107(C)(4), or electronic service under MCR 1.109(G)(6)(a).

(B) Service When Identity or Whereabouts of Father is Unascertainable.

(1) If service cannot be made under subrule (A)(2) because the identity of the father of a child born out of wedlock or the whereabouts of the identified father has not been ascertained after diligent inquiry, the petitioner must file proof ~~by affidavit or by declaration under MCR 1.109(D)(3), of the attempt~~of the efforts made to identify or locate the father in a statement verified under MCR 1.109(D)(3). No further service is necessary before the hearing to identify the father and to determine or terminate his rights.

(2) [Unchanged.]

(C) Service When Whereabouts of Noncustodial Parent Is Unascertainable.

If service of a petition to terminate the parental rights of a noncustodial parent pursuant to MCL 710.51(6) cannot be made under subrule (A)(2) because the whereabouts of the noncustodial parent has not been ascertained after diligent inquiry, the petitioner must file proof~~, by affidavit or by declaration under MCR 1.109(D)(3), of the attempt~~ of the efforts made to locate the noncustodial parent in a statement verified under MCR 1.109(D)(3). If the court finds, on reviewing the statement~~affidavit or declaration~~, that service cannot be made because the whereabouts of the person has not been determined after reasonable efforts, the court may direct any manner of substituted service of the notice of hearing, including service by publication.

(D) Service by Publication.

(1) Requirements. A notice of hearing or other notice required to be made by publication must be published in a newspaper as defined by MCR 2.106(F) at least one time 21 days before the date of the hearing. Publication shall be in the county in which the court is located.

(2) Contents of Notice. The published notice must include the name of the individual to whom the notice is given, a statement describing the nature of the hearing, and a statement that the result of the hearing may affect the individual's interest in the matter, including possible termination of parental rights.

(3) Service of Notice. A copy of the notice shall be mailed to the individual to whom the notice is given at his or her last known address. If the last known address of the individual cannot be ascertained after diligent inquiry, mailing a copy of the notice is not required.

(4) Proof of service under this subrule shall be made according to MCR 2.106(G).

RULE 3.805. TEMPORARY PLACEMENTS, TIME FOR SERVICE OF NOTICE OF HEARING TO DETERMINE DISPOSITION OF CHILD.

(A) Time for ~~Personal~~ Service. ~~Personal s~~Service of notice of hearing on a petition for disposition of a child ~~pursuant to~~under MCL 710.23e(1) must be served at least:

(1) 3 days before the date set for hearing for personal service under MCR 2.107(C)(1) or (2), e-mail service under MCR 2.107(C)(4), or electronic service under MCR 1.109(G)(6)(a); or

(2) 7 days before the date set for hearing when served by first-class mail under MCR 2.107(C)(3).

~~(B) Time for Service by Mail. Service by mail must be made at least 7 days before the date set for hearing.~~

(~~C~~B) Interested Party, Whereabouts Unknown. If the whereabouts of an interested party, other than the putative father who did not join in the temporary placement, is unknown, service on that interested party will be sufficient if ~~personal service or~~ service ~~by mail~~ is attempted at the last known address of the interested party.

(~~D~~C) [Relettered but otherwise unchanged.]

RULE 3.806. REHEARINGS.

(A) Filing, Notice and Response. A party may seek rehearing under MCL 710.64(1) by timely filing a petition stating the basis for rehearing. Immediately upon filing the petition, the petitioner must give all interested parties notice of its filing in accordance with MCR ~~5.105~~3.802. Any interested party may file a response within 7 days of the date of service of notice on the interested party.

(B)-(D) [Unchanged.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(B) [Unchanged.]

(C) Summons.

(1) [Unchanged.]

(2) The summons must also include the following advice to the defendant:

(a)-(c) [Unchanged.]

(d) The defendant has a right to a jury trial which will be lost unless it is demanded in the first defense response, written or oral. The jury trial fee must be paid when the demand is made, unless payment of fees is waived ~~or suspended~~ under MCR 2.002.

(D) Service of Process. The plaintiff must have a~~A~~ copy of the summons and complaint and all attachments ~~must be~~ served on the defendant by mail. ~~Unless the court does the mailing and keeps a record, t~~The plaintiff must perfect the mail service by attaching a postal receipt to the proof of service. In addition to mailing, the defendant must be served in one of the following ways:

(1) [Unchanged.]

(2) By delivering the ~~papers~~documents at the premises to a member of the defendant's household who is

(a)-(b) [Unchanged.]

(c) asked to deliver the ~~papers~~documents to the defendant; or

(3) After diligent attempts at personal service have been made, by securely attaching the ~~papers~~documents to the main entrance of the tenant's dwelling unit. A return of service made under this subrule ~~(D)(3)~~ must list the attempts at personal service. Service

under this subrule ~~(D)(3)~~ is effective only if a return of service is filed showing that, after diligent attempts, personal service could not be made. An officer who files proof that service was made under this subrule ~~(D)(3)~~ is entitled to the regular personal service fee.

(E) [Unchanged.]

(F) Appearance and Answer; Default.

(1) Appearance and Answer. The defendant or the defendant's attorney must appear and answer the complaint by the date on the summons. Appearance and answer may be made as follows:

(a) [Unchanged.]

(b) By orally answering each allegation in the complaint at the hearing. The answers must be recorded ~~or noted on the complaint~~.

(2)-(5) [Unchanged.]

(G)-(O) [Unchanged.]

RULE 4.202. SUMMARY PROCEEDINGS; LAND CONTRACT FORFEITURE.

(A)-(G) [Unchanged.]

(H) Answer; Default.

(1) [Unchanged.]

(2) Default.

(a) If the defendant fails to appear, the court, on the plaintiff's motion, may enter a default and may hear the plaintiff's proofs in support of judgment. If satisfied that the complaint is accurate, the court must enter a default judgment under MCL 600.5741, and in accord with subrule (J). The plaintiff must mail the default judgment ~~must be mailed~~ to the defendant and file a proof of service with the court.~~by the court clerk and~~ The default judgment must inform the defendant that (if applicable)

(i)-(ii) [Unchanged.]

(b)-(c) [Unchanged.]

(3) [Unchanged.]

(I)-(L) [Unchanged.]

RULE 4.303. NOTICE.

(A)-(B) [Unchanged.]

(C) Notice Not Served. If it appears that notice was not received by the defendant at least 7 days before the appearance date and the defendant does not appear, the clerk must, at the plaintiff's request, issue further notice without additional cost to the plaintiff, setting the hearing for a future date. The further notice may be served as provided in MCR 2.105.

RULE 4.306. REMOVAL TO TRIAL COURT.

(A) [Unchanged.]

(B) Order; Fee. On receiving a demand for removal, the court shall, by a written order filed in the action, direct removal to the trial court for further proceedings.

(1) [Unchanged.]

(2) ~~A copy of the order must be mailed to each party by the clerk~~The party demanding removal must promptly serve the order on the opposing party and file proof of service with the court.

(3) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 5.001. APPLICABILITY.

(A) Applicability of Rules. Procedure in probate court is governed by the general rules set forth in chapter one and by the rules applicable to other civil proceedings set forth in chapter two, except as modified by the rules in this chapter.

(B) [Unchanged.]

RULE 5.104. PROOF OF SERVICE; WAIVER AND CONSENT; UNOPPOSED PETITION.

(A) Proof of Service.

(1) Whenever service is required by statute or court rule, a proof of service must be filed promptly and ~~at the latest~~ before a hearing to which the ~~paper~~document relates. If the document does not involve a hearing, a proof of service must be filed with the document ~~or at the time the paper is required to be filed with the court if the paper does not relate to a hearing~~. The proof of service must include a description of the ~~papers~~documents served, the date of service, the manner and method of service, and the person or persons served.

(2) Except as otherwise provided by rule, proof of service of a ~~paper~~document required or permitted to be served may be by

(a) including it at the end~~a copy~~ of the notice of hearing or other documents being filed with the court, or~~, if any~~;

(b) a written statement by the individual who served the notice of hearing or other documents, verified under MCR 1.109(D)(3).~~copies of other paper served with the notice of hearing, with a description of the paper in the proof of service;~~

~~(c) authentication under MCR 1.109(D)(3) of the person making service.~~

(3)-(4) [Unchanged.]

(B) Waiver and Consent.

(1) [Unchanged.]

(2) Consent. The relief requested in an application, petition, or motion may be granted by consent. An interested person who consents to an application, pe-

tition, or motion does not have to be served with or waive notice of hearing on the application, petition, or motion. The consent must

(a) [Unchanged.]

(b) be in a writing which is dated and signed by the interested person or someone authorized to consent on the interested person's behalf and must contain a ~~declaration~~statement that the person signing has received a copy of the application, petition, or motion.

(3)-(4) [Unchanged.]

(C) Unopposed Petition. If a petition is unopposed at the time set for the hearing, the court may either grant the petition on the basis of the recitations in the petition or conduct a hearing. However, an order determining heirs based on an uncontested petition to determine heirs may only be entered on the basis of ~~sworn~~ testimony or a completed SCAO-approved~~sworn~~ testimony identifying heirs form verified under MCR 1.109(D)(3). An order granting a petition to appoint a guardian may only be entered on the basis of testimony at a hearing.

RULE 5.105. MANNER AND METHOD OF SERVICE.

(A) Manner of Service.

(1) [Unchanged.]

(2) Unless another method of service is required by statute, court rule, or special order of a probate court, service may be made:

(a) to the current address of an interested person by registered, certified, or ordinary first-class mail~~.~~, or

(b) by electronic service in accordance with MCR 1.109(G)(6)(a).

Foreign consul and the Attorney General may be served by mail or by electronic service in accordance with MCR 1.109(G)(6)(a).

(3) An interested person whose address or whereabouts is not known may be served by publication, if ~~an affidavit or~~ a declaration of intent to give notice by publication, verified under MCR 1.109(D)(3) is filed with the court~~,~~. The declaration must set forth facts ~~showing~~asserting that the address or whereabouts of the interested person could not be ascertained on diligent inquiry. Except in proceedings seeking a determination of a presumption of death based on absence pursuant to MCL 700.1208(2), after an interested person has once been served by publication, notice is only required on an interested person whose address is known or becomes known during the proceedings.

(4) [Unchanged.]

(B) Method of Service.

(1) Personal Service.

(a) On an Attorney. Personal service of a ~~paper~~document on an attorney must be made by

(i)-(iii) [Unchanged.]

(iv) sending the ~~paper~~document by registered mail or certified mail, return receipt requested, and delivery restricted to the addressee; but service is not made for purpose of this subrule until the attorney receives the ~~paper~~document.

(b) On Other Individuals. Personal service of a ~~paper~~document on an individual other than an attorney must be made by

(i)-(ii) [Unchanged.]

(iii) sending the ~~paper~~document by registered mail or certified mail, return receipt requested, and delivery restricted to the addressee; but service is not made for purpose of this subrule until the individual receives the ~~paper~~document.

(c) [Unchanged.]

(2)-(3) [Unchanged.]

(4) E-mail. Unless otherwise limited or provided by this court rule or MCR 1.109(G)(6)(a)(ii), parties to a civil action or interested persons to a proceeding may agree to service by e-mail in the manner provided in and governed by MCR 2.107(C)(4).

(5) Electronic Service. Electronic service of a document shall be made in accordance with MCR 1.109(G)(6)(a) when required.

(C) Petitioner, Service Not Required. For service of notice of hearing on a petition, the petitioner, although otherwise an interested person, is presumed to have waived notice and consented to the petition, unless the petition expressly indicates that the petitioner does not waive notice and does not consent to the granting of the requested prayers without a hearing. Although a petitioner or a fiduciary may in fact be an interested person, the petitioner need not indicate, either by written waiver or proof of service, that the petitioner has received a copy of any ~~paper~~ document required by these rules to be served on interested persons.

(D) [Unchanged.]

(E) Service on Beneficiaries of Future Interests. A notice that must be served on unborn or unascertained interested persons not represented by a fiduciary or guardian ad litem is considered served on the unborn or unascertained interested persons if it is served as provided in this subrule.

(1) If an interest is limited to persons in being and the same interest is further limited to the happening of a future event to unascertained or unborn persons,

notice and ~~papers~~documents must be served on the persons to whom the interest is first limited.

(2) If an interest is limited to persons whose existence as a class is conditioned on some future event, notice and ~~papers~~documents must be served on the persons in being who would comprise the class if the required event had taken place immediately before the time when the ~~papers~~documents are served.

(3) If a case is not covered by subrule (E)(1) or (2), notice and ~~papers~~documents must be served on all known persons whose interests are substantially identical to those of the unascertained or unborn interested persons.

RULE 5.107. OTHER ~~PAPERS~~DOCUMENTS REQUIRED TO BE SERVED.

(A) Other ~~P~~apersDocuments to be Served. The person filing a petition, an application, a completed SCAO-approved~~sworn~~ testimony identifying heirs form, a completed SCAO-approved supplemental ~~sworn~~ testimony identifying heirs form, a motion or objection, a response~~ or objection~~, an instrument offered or admitted to probate, an accounting, or a sworn closing statement with the court must serve a copy of that document on interested persons. The person who obtains an order from the court must serve a copy of the order on interested persons.

(B) [Unchanged.]

RULE 5.108. TIME OF SERVICE.

(A)-(B) [Unchanged.]

(C) Electronic Service. Electronic service made under MCR 1.109(G)(6)(a) must be made at least 7 days before the date set for hearing or an adjourned date.

(C)-(E) [Relettered (D)-(F) but otherwise unchanged.]

RULE 5.113. FORM, CAPTIONING, SIGNING, AND VERIFYING DOCUMENTS.

(A) Forms of Documents Generally. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E). ~~Documents must be substantially in the form approved by the~~If the State Court Administrative Office~~, if a form~~ has ~~been~~ approved a form for a particular purpose, it must be used when preparing that particular document for filing with the court~~for the use~~. An application, petition, inventory, accounting, proof of claim, or proof of service must be verified in accordance with MCR 1.109(D)(3).

(B) Contents of Petitions.

(1) [Unchanged.]

(2) The petition may incorporate by reference ~~papers~~documents and lists of interested persons previously filed with the court if changes in the papers or lists are set forth in the incorporating petition.

(C) Filing by Registered Mail. Except as otherwise stated in this subrule~~Where e-filing is implemented~~, any document required by law to be filed in or delivered to the court by registered mail may be filed ~~through the electronic filing system~~in accordance with MCR 1.109(G)(6)(a). Deliveries of wills or codicils must be delivered in accordance with MCL 700.2515 and 700.2516.

(D) Filing Additional ~~Papers~~Documents. The court in its discretion may receive for filing a ~~paper~~document not required to be filed.

RULE 5.117. APPEARANCE BY ATTORNEYS.

(A) [Unchanged.]

(B) Appearance.

(1) [Unchanged.]

(2) Notice of Appearance. If an appearance is made in a manner not involving the filing of a ~~paper~~document served with the court or if the appearance is made by filing a ~~paper~~document which is not served on the interested persons, the attorney must promptly file a written appearance and serve it on the interested persons whose addresses are known or who are authorized users of the electronic filing system under MCR 1.109(G)(6)(a) and on the fiduciary. ~~The attorney's address and telephone number must be included in the appearance.~~

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other ~~paper~~document filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a ~~paper~~document in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered. This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the client.

(b) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 5.118. AMENDING OR SUPPLEMENTING DOCUMENTS~~PAPERS~~.

(A) ~~Papers~~Documents Subject to Hearing. A person who has filed a ~~paper~~document that is subject to a hearing may amend or supplement the ~~paper~~document

(1)-(2) [Unchanged.]

(B) ~~Papers~~Documents Not Subject to Hearing. A person who has filed a ~~paper~~document that is not subject to a hearing may amend or supplement the ~~paper~~document if service is made pursuant to these rules.

RULE 5.119. ADDITIONAL PETITIONS; OBJECTIONS; HEARING PRACTICES.

(A) Right to Hearing, New Matter. An interested person may, within the period allowed by law or these rules, file a petition and obtain a hearing with respect to the petition. The petitioner must serve copies of the petition and notice of hearing on the fiduciary and other interested persons whose addresses are known or who are authorized users of the electronic filing system under MCR 1.109(G)(6)(a).

(B) Objection to Pending Matter. An interested person may object to a pending petition orally at the hearing or by filing and serving a ~~paper~~document which conforms with MCR 1.109(D) and MCR 5.113. The court may adjourn a hearing based on an oral objection and require that a proper written objection be filed and served.

(C)-(D) [Unchanged.]

RULE 5.120. ACTION BY FIDUCIARY IN CONTESTED MATTER; NOTICE TO INTERESTED PERSONS; FAILURE TO INTERVENE.

The fiduciary represents the interested persons in a contested matter. The fiduciary must give notice to all interested persons whose addresses are known or who are authorized users of the electronic filing system under MCR 1.109(G)(6)(a) that a contested matter has been commenced and must keep such interested persons reasonably informed of the fiduciary's actions concerning the matter. The fiduciary must inform the interested persons that they may file a petition to intervene in the matter and that failure to intervene shall result in their being bound by the actions of the fiduciary. The interested person shall be bound by the actions of the fiduciary after such notice and until the interested person notifies the fiduciary that the inter-

ested person has filed with the court a petition to intervene.

RULE 5.125. INTERESTED PERSONS DEFINED.

(A)-(B) [Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(18) [Unchanged.]

(19) The persons interested in a proceeding under the Mental Health Code in a petition for appointment of a guardian of an individual with a developmental disability are the

(a) individual,

(b) individual's attorney,

(c) petitioner,

(d) individual's presumptive heirs,

(e) preparer of the report or another appropriate person who performed an evaluation,

(f) director of any facility where the individual may be residing,

(g) individual's guardian ad litem, if appointed, and

(h) such other persons as the court may determine.

(19)-(24) [Renumbered (20)-(25) but otherwise unchanged.]

(25~~5~~6) The persons interested in a petition for the modification or termination of a guardianship or conservatorship or for the removal of a guardian or a conservator are

(a) those interested in a petition for appointment under subrule (C)(~~19~~20), (2~~1~~2), (2~~2~~3), or (2~~4~~5) as the case may be, and

(b) [Unchanged.]

(2~~6~~7) The persons interested in a petition by a conservator for instructions or approval of sale of real estate or other assets are

(a) [Unchanged.]

(b) those persons listed in subrule (C)(2~~4~~5) who will be affected by the instructions or order.

(27)-(28) [Renumbered (28)-(29) but otherwise unchanged.]

~~(29) The persons interested in a petition for emancipation of a minor are~~

~~(a) the minor,~~

~~(b) parents of the minor,~~

~~(c) the affiant on an affidavit supporting emancipation, and~~

~~(d) any guardian or conservator.~~

(30)-(32) [Unchanged.]

(33) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code, the persons interested in a proceeding affecting a trust other than those already covered by subrules (C)(6), (C)(~~28~~29), and (C)(32) are:

(a)-(g) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 5.126. DEMAND OR REQUEST FOR NOTICE.

(A) [Unchanged.]

(B) Procedure.

(1) Obligation to Provide Notice or Copies of Documents. Except in small estates under MCL 700.3982 and MCL 700.3983, the person responsible for serving a ~~paper~~document in a decedent estate, guardianship, or conservatorship in which a demand for notice is filed

is responsible for providing copies of any orders and filings pertaining to the proceeding in which the demandant has requested notification. If no proceeding is pending at the time the demand is filed, the court must notify the petitioner or applicant at the time of filing that a demand for notice has been filed and of the responsibility to provide notice to the demandant.

(2) Rights and Obligations of Demandant.

(a) [Unchanged.]

(b) Unless the demand for notice is limited to a specified class of ~~papers~~documents, the demandant is entitled to receive copies of all orders and filings subsequent to the filing of the demand. The copies must be served on the demandant through the electronic filing system if the demandant is an authorized user under MCR 1.109(G)(6)(a), but if not, mailed to the address specified in the demand. If the ~~address becomes invalid and the demandant does not provide a new address~~copies are undeliverable, no further copies of ~~papers~~documents need be provided to the demandant.

(C) Termination, Withdrawal.

(1)-(2) [Unchanged.]

(3) Withdrawal. The demandant may withdraw the demand at any time by communicating the withdrawal in writing to the fiduciary and to the court. If withdrawn, the demandant shall not continue to be served with documents in the case.

RULE 5.132. PROOF OF WILLS.

(A) [Unchanged.]

(B) Use of Copy of Will. When proof of a will is required and a deposition is to be taken, a copy of the original will or other document ~~made by photographic~~

~~or similar process~~reproduced in accordance with the Records Reproduction Act, MCL 24.401 *et seq.* may be used at the deposition.

RULE 5.162. FORM AND SIGNING OF JUDGMENTS AND ORDERS.

(A) Form of Judgments and Orders. A proposed judgment or order must be prepared in accordance with MCR 2.602(A) and MCR 1.109(D)(2).~~include the name, address, and telephone number of the attorney or party who prepared it. All judgments and orders of the court must be typewritten or legibly printed in ink and signed by the judge to whom the proceeding is assigned.~~

(B) [Unchanged.]

RULE 5.202. LETTERS OF AUTHORITY.

(A) Issuance. Letters of authority shall be issued after the appointment and qualification of the fiduciary. If bond is ordered, the letters shall be issued after proof of bond has been filed with the court, unless otherwise ordered. Unless ordered by the court, letters of authority will not have an expiration date.

(B)-(C) [Unchanged.]

RULE 5.203. FOLLOW-UP PROCEDURES.

Except in the instance of a personal representative who fails to timely comply with the requirements of MCL 700.3951(1), if it appears to the court that the fiduciary is not properly administering the estate, the court shall proceed as follows:

(A) Notice of Deficiency. The court must notify the fiduciary, the attorney for the fiduciary, if any, and each of the sureties for the fiduciary of the nature of the deficiency, together with a notice to correct the deficiency within 28 days, or, in the alternative, to appear

before the court or an officer designated by it at a time specified within 28 days for a conference concerning the deficiency. Service of the notice of deficiency is complete on mailing to the last known address of the fiduciary or when served under MCR 1.109(G)(6)(a).

(B) Conference, Memorandum. If a conference is held, the court must prepare a written memorandum setting forth the date of the conference, the persons present, and any steps required to be taken to correct the deficiency. The steps must be taken within the time set by the court but not to exceed 28 days from the date of the conference. A copy of the memorandum must be given to those present at the conference ~~and. i~~If the fiduciary is not present at the conference, a copy of the memorandum must be mailed to the last known address of the fiduciary ~~at the last known address~~or served on the fiduciary under MCR 1.109(G)(6)(a).

(C)-(E) [Unchanged.]

RULE 5.205. ADDRESS OF FIDUCIARY.

A fiduciary must keep the court and the interested persons informed in writing within 7 days of any change in the fiduciary's address even if the fiduciary is an authorized user of the electronic filing system. Any notice ~~sent to~~served on the fiduciary by the court ~~by ordinary mail~~ to the last address on file or under MCR 1.109(G)(6)(a) shall be notice to the fiduciary.

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES.

(A) Methods of Commencement. A decedent estate may be commenced by filing an application for an informal proceeding or a petition for a formal testacy proceeding. A request for supervised administration may be made in a petition for a formal testacy proceeding. When filing either an application or petition to

commence a decedent estate, a copy of the death certificate must be attached. If the death certificate is not available, the petitioner may provide alternative documentation of the decedent's death. The court is prohibited from Rrequiring additional documentation, such as information about the proposed or appointed personal representative~~, is prohibited~~.

(B) ~~Sworn~~ Testimony Identifying Heirs Form. At least one completed SCAO-approved~~sworn~~ testimony identifying heirs ~~form sufficient to establish the identity of heirs~~ and devisees form must be submitted with the application or petition that commences proceedings. A ~~sworn~~ testimony identifying heirs form must be verified under MCR 1.109(D)(3)~~executed before a person authorized to administer oaths~~.

(C)-(D) [Unchanged.]

RULE 5.304. NOTICE OF APPOINTMENT.

(A) Notice of Appointment. The personal representative must, not later than 14 days after appointment, serve notice of appointment by personal service or by first-class mail as provided in MCL 700.3705 and the agreement and notice relating to attorney fees required by MCR 5.313(D). No notice of appointment need be served if the person serving as personal representative is the only person to whom notice must be given.

(B) [Unchanged.]

(C) Prior Publication. After an interested person has once been served by publication, notice of appointment is only required if that person's address is known or becomes known during the proceedings or the person registers as an authorized user of the electronic filing system under MCR 1.109(G)(6)(a).

RULE 5.307. REQUIREMENTS APPLICABLE TO ALL DECEDENT ESTATES.

(A) [Unchanged.]

(B) Notice of Continued Administration. If unable to complete estate administration within one year of the original personal representative's appointment, the personal representative must file with the court and serve on all interested persons a notice that the estate remains under administration, specifying the reason for the continuation of administration. The notice must be ~~given~~served within 28 days of the first anniversary of appointment and all subsequent anniversaries during which the administration remains uncompleted.

(C) Notice to Personal Representative. At the time of appointment, the court must provide the personal representative with written notice of information to be provided to the court. The notice should be substantially in the following form or in the form specified by MCR 5.310(E), if applicable:

"Inventory Information: Within 91 days of the date of the letters of authority, you must submit to the court the information necessary for computation of the probate inventory fee. You must also provide the name and address of each financial institution listed on your inventory at the time the inventory is presented to the court. The address for a financial institution shall be either that of the institution's main headquarters or the branch used most frequently by the personal representative."

"Change of Address: You must keep the court and all interested persons informed in writing within 7 days of any change in your address that you have provided for service."

"Notice of Continued Administration: If you are unable to complete the administration of the estate within one year of the original personal representative's appointment, you must file with the court and all interested persons a notice that the estate remains under administration, specifying the reason for the continuation of the administration. You must give this notice within 28 days of the first anniversary of the original appointment and all subsequent anniversaries during which the administration remains uncompleted."

"Duty to Complete Administration of Estate: You must complete the administration of the estate and file appropriate closing ~~papers~~documents with the court. Failure to do so may result in personal assessment of costs."

(D) [Unchanged.]

(E) Requiring or Filing of Additional ~~Papers~~Documents. Except in formal proceedings and supervised administration, the court may not require the filing of any ~~papers~~documents other than those required to be filed by statute or court rule. However, additional ~~papers~~documents may be filed under MCR 5.113(D).

RULE 5.308. FORMAL PROCEEDINGS.

(A) [Unchanged.]

(B) Determination of Heirs.

(1) [Unchanged.]

(2) Determination Without Estate Administration.

(a) Petition and Testimony Identifying Heirs Form. Any person may initiate a formal proceeding to determine intestacy and heirs without appointment of a personal representative by filing a petition and a ~~sworn~~ completed SCAO-approved testimony identifying heirs form~~, executed before a person authorized to~~

~~administer oaths,~~ sufficient to establish the domicile of the decedent at the time of death and the identity of the interested persons. A testimony identifying heirs form must be verified under MCR 1.109(D)(3).

(b)-(d) [Unchanged.]

RULE 5.309. INFORMAL PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Notice of Intent to Seek Informal Appointment as Personal Representative.

(1) A person who desires to be appointed personal representative in informal proceedings must ~~give~~serve notice of intent to seek appointment and a copy of the application ~~to~~on each person having a prior or equal right to appointment who does not renounce this right in writing before the appointment is made.

(2)-(3) [Unchanged.]

(D) [Unchanged.]

RULE 5.310. SUPERVISED ADMINISTRATION.

(A)-(B) [Unchanged.]

(C) Filing ~~Papers~~Documents With the Court. The personal representative must file the following additional ~~papers~~documents with the court and serve copies on the interested persons:

(1) Inventory. The personal representative must file an inventory as prescribed by MCR 5.307(A).

~~(a) Administration Commenced Supervised. If supervised administration is ordered at the commencement of the estate administration, the personal representative must file the inventory within 91 days of the date of the letters of authority.~~

~~(b) Administration Commenced Without Supervision. If supervised administration is ordered after a~~

~~personal representative has been appointed, the court must specify in the order a time for that personal representative to file the inventory.~~

(2)-(6) [Unchanged.]

(7) Such other ~~papers~~documents as are ordered by the court.

(D) [Unchanged.]

(E) Notice to Personal Representative. When supervised administration is ordered, the court must serve a written notice of duties on the personal representative. The notice must be substantially as follows:

"Inventories: You are required to file an inventory of the assets of the estate within 91 days of the date of your letters of authority or as ordered by the court. The inventory must list in reasonable detail all the property owned by the decedent at the time of death, indicating, for each listed item, the fair market value at the time of decedent's death and the type and amount of any encumbrance. If the value of any item has been obtained through an appraiser, the inventory should include the appraiser's name and address with the item or items appraised by that appraiser."

"Accountings: You are required to file annually, or more often if the court directs, a complete itemized accounting of your administration of the estate, showing in detail all the receipts and disbursements and the property remaining in your hands together with the form of the property. When the estate is ready for closing, you are required to file a final accounting and an itemized and complete list of all properties remaining. Subsequent annual and final accountings must be filed within 56 days after the close of the accounting period."

"Change of Address: You are required to keep the court and interested persons informed in writing

within 7 days of any change in your address that you have provided for service."

"Notice of Continued Administration: If you are unable to complete the administration of the estate within one year of the original personal representative's appointment, you must file with the court and all interested persons a notice that the estate remains under administration, specifying the reason for the continuation of the administration. You must give this notice within 28 days of the first anniversary of the original appointment and all subsequent anniversaries during which the administration remains uncompleted."

"Duty to Complete Administration of Estate: You must complete the administration of the estate and file appropriate closing ~~papers~~documents with the court. Failure to do so may result in personal assessment of costs."

(F)-(H) [Unchanged.]

RULE 5.311. CLOSING ESTATE.

(A) [Unchanged.]

(B) Formal Proceedings.

(1)-(2) [Unchanged.]

(3) Discharge. A personal representative may petition for discharge from liability with notice to the interested persons. A personal representative who files such a petition with the court must also file the ~~papers~~documents described in MCR 5.310(C) and (D), as applicable, proofs of service of those ~~papers~~documents that are required to be served on interested persons, and such other ~~papers~~documents as the court may require. The court may order the personal representative discharged if the court is satisfied that the personal representative has properly administered the estate.

(4) Other Requests for Relief. With respect to other requests for relief, the petitioner must file appropriate ~~papers~~documents to support the request for relief.

(5) [Unchanged.]

(C) [Unchanged.]

RULE 5.313. COMPENSATION OF ATTORNEYS.

(A)-(C) [Unchanged.]

(D) Notice to Interested Persons. Within 14 days after the appointment of a personal representative or the retention of an attorney by a personal representative, whichever is later, the personal representative must ~~mail to~~serve on the interested persons whose interests will be affected by the payment of attorney fees, a notice ~~in the~~on a form ~~substantially~~ approved by the State Court Administrator and a copy of the written fee agreement. The notice must state:

(1)-(4) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 5.402. COMMON PROVISIONS.

(A)-(B) [Unchanged.]

(C) Responsibility for Giving Notice; Manner of Service. The petitioner is responsible for giving notice of hearing. Regardless of statutory provisions, an interested person may be served the notice by mail, ~~by~~ personal service, or when necessary, ~~by~~ publication. ~~when necessary; h~~However, if the person who is the subject of the petition is 14 years of age or older, notice of the initial hearing must be served on the person personally unless another method of service is specifically permitted in the circumstances.

(D) Letters of Authority. After entering an order appointing a fiduciary, the court must issue letters of authority after an acceptance of appointment is filed,

and if ordered, the filing of the fiduciary's bond. The letters of authority shall be issued~~On the filing of the acceptance of appointment or bond required by the order appointing a fiduciary, the court shall issue letters of authority~~ on a form approved by the state court administrator. Any restriction or limitation of the powers of a guardian or conservator must be set forth in the letters of authority.

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1)-(4) [Unchanged.]

(5) If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall do all of the following:

(a)-(b) [Unchanged.]

(c) provide notice of the guardianship and the hearing scheduled in subrule (5)(a) and the potential applicability of the Indian Child Welfare Act and the Michigan Indian Family Preservation Act on a form approved by the State Court Administrative Office to the persons prescribed in MCR 5.125(A)(8), (C)(19), and (C)(25) in accordance with MCR 5.109(1). A copy of the notice shall be ~~mailed to~~served on the guardian ~~by first-class mail~~.

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) Petition for Guardianship of Minor.

(1) [Unchanged.]

(2) Investigation. Upon the filing of a petition, the court may appoint a guardian ad litem to represent the interests of a minor and may order the Department of Health and Human Services or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investi-

gation in accordance with MCL 700.5204(1). If the petition involves an Indian child, the report shall contain the information required in MCL 712B.25(1). The report shall be filed with the court and served no later than 7 days before the hearing on the petition. If the petition for guardianship states that it is unknown whether the minor is an Indian child, the investigation shall include an inquiry into Indian tribal membership.

(3) [Unchanged.]

(4) Social History. ~~If the court requires t~~The petitioner ~~to~~must file a social history before a hearing is held on a petition for guardianship of a minor~~, it~~ and shall do so on a form approved by the State Court Administrative Office. The social history for minor guardianship is confidential, and it is not to be released, except on order of the court, to the parties or the attorneys for the parties.

(5) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 5.405. PROCEEDINGS ON GUARDIANSHIP OF INCAPACITATED INDIVIDUAL.

(A) Examination by Physician or Mental Health Professional.

(1) Admission of Report. The court may receive into evidence without testimony a written report of a physician or mental health professional who examined an individual alleged to be incapacitated, provided that a copy of the report is filed with the court five days before the hearing and that the report is ~~substantially in~~on the form required by the state court administrator. A party offering a report must promptly inform the parties that the report is filed and available. The court

may issue on its own initiative, or any party may secure, a subpoena to compel the preparer of the report to testify.

(2)-(3) [Unchanged.]

(B)-(C) [Unchanged.]

RULE 5.409. REPORT OF GUARDIAN; INVENTORIES AND ACCOUNTS OF CONSERVATORS.

(A) Reports. A guardian shall file a written report annually within 56 days after the anniversary of appointment and at other times as the court may order. Reports must be ~~substantially~~ in the form approved by the state court administrator. The guardian must serve the report on the persons listed in MCR 5.125(C)(2~~3~~4).

(B) [Unchanged.]

(C) Accounts.

(1)-(4) [Unchanged.]

(5) Contents. The accounting is subject to the provisions of MCR 5.310(C)(2)(c) and (d), except that references to a personal representative shall be to a conservator. A copy of the corresponding financial institution statement ~~must be presented to the court~~ or a verification of funds on deposit must be filed with the court, either of which must reflect the value of all liquid assets held by a financial institution dated within 30 days after the end of the accounting period, unless waived by the court for good cause.

(6) [Unchanged.]

(D) Service and Notice. A copy of the account must be ~~sent to~~served on the interested persons as provided by these rules. Notice of hearing to approve the account must be ~~given to~~served on interested persons as provided in subchapter 5.100 of these rules.

(E)-(F) [Unchanged.]

RULE 5.501. TRUST PROCEEDINGS IN GENERAL.

(A)-(C) [Unchanged.]

(D) Appointment of Trustee not Named in Creating Document. An interested person may petition the court for appointment of a trustee when there is a vacancy in a trusteeship. The court may issue an order appointing as trustee the person nominated in the petition or another person. The order must state whether the trustee must file a bond or ~~execute~~sign and file an acceptance.

(E) Qualification of Trustee. A trustee appointed by an order of the court, nominated as a trustee in a will that has been admitted to probate shall qualify by ~~executing~~signing and filing an acceptance indicating the nominee's willingness to serve. The trustee must serve the acceptance and order, if any, on the then known qualified trust beneficiaries described in MCL 700.7103(g)(i) and, in the case of a testamentary trustee, on the personal representative of the decedent estate, if one has been appointed. No letters of trusteeship shall be issued by the court. The trustee or the attorney for the trustee may establish the trustee's incumbency by executing an affidavit to that effect, identifying the trustee and the trust and indicating that any required bond has been filed with the court and is in force.

(F) [Unchanged.]

RULE 5.784. PROCEEDINGS ON A DURABLE POWER OF ATTORNEY FOR HEALTH CARE OR MENTAL HEALTH TREATMENT.

(A)-(B) [Unchanged.]

(C) Notice of Hearing, Service, Manner and Time.

(1) Manner of Service. If the address of an interested party is known or can be learned by diligent inquiry,

notice must be by mail or personal service, but service by mail must be supplemented by facsimile, electronic mail, or telephone contact within the period for timely service when the hearing is an expedited hearing or a hearing on the initial determination regarding whether the patient is unable to participate in medical or mental health treatment decisions.

(2)-(3) [Unchanged.]

(D)-(E) [Unchanged.]

Staff comment: The amendments of Rules 1.109, 2.102, 2.104, 2.106, 2.107, 2.117, 2.119, 2.403, 2.503, 2.506, 2.508, 2.518, 2.602, 2.603, 2.621, 3.101, 3.104, 3.203, 3.205, 3.210, 3.302, 3.607, 3.613, 3.614, 3.705, 3.801, 3.802, 3.805, 3.806, 4.201, 4.202, 4.303, 4.306, 5.001, 5.104, 5.105, 5.107, 5.108, 5.113, 5.117, 5.118, 5.119, 5.120, 5.125, 5.126, 5.132, 5.162, 5.202, 5.203, 5.205, 5.302, 5.304, 5.307, 5.308, 5.309, 5.310, 5.311, 5.313, 5.402, 5.404, 5.405, 5.409, 5.501, and 5.784 and addition of Rule 3.618 of the Michigan Court Rules are an expected progression necessary for design and implementation of the statewide electronic-filing system. These particular amendments will assist in implementing the goals of the project.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 27, 2019, effective May 1, 2019 (File No. 2016-27)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.2 of the Michigan Rules of Professional Conduct is adopted, effective May 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.2. ADVERTISING.

(a)-(c) [Unchanged.]

(d) For purposes of media advertising, services of a lawyer or law firm that are advertised under the heading of a phone number, web address, icon, or trade name shall identify the name and contact information of at least one lawyer responsible for the content of the advertisement. The identification shall appear on or in the advertisement itself; or, if that is not practical due to space limitations, the identification shall be prominently displayed on the home page of the law firm's website and any other website used by the law firm for advertising purposes.

Comment: [Unchanged.]

Staff Comment: The amendment of MRPC 7.2 requires lawyer media advertisements under the heading of a phone number, web address, icon, or trade name to identify the name and contact information of at least one lawyer responsible for the content of the advertisement. The identification shall appear in the advertisement or, if not practical because of size restrictions, on the homepage of the law firm's website.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted April 3, 2019, effective May 1, 2019 (File No. 2018-04)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the follow-

ing amendments of Rules 7.212 and 7.312 of the Michigan Court Rules are adopted, effective May 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.212. BRIEFS.

(A)-(G) [Unchanged.]

(H) Amicus Curiae.

(1)-(2) [Unchanged.]

(3) Except for briefs presented on behalf of amicus curiae listed in MCR 7.312(H)(2), a brief filed under this rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

(I)-(J) [Unchanged.]

RULE 7.312. BRIEFS AND APPENDIXES IN CALENDAR CASES.

(A)-(G) [Unchanged.]

(H) Amicus Curiae Briefs and Argument.

(1)-(3) [Unchanged.]

(4) Except for briefs presented on behalf of amicus curiae listed in subrule (H)(2), a brief filed under this rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the

amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

(5~~4~~) [Renumbered but otherwise unchanged.]

(I)-(J) [Unchanged.]

Staff Comment: The amendments of MCR 7.212 and 7.312 require amicus briefs to indicate certain information regarding the preparation of the brief and disclosure of monetary contributions. The amendments are similar to Supreme Court Rule 37.6.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted April 11, 2019, effective September 1, 2019 (File No. 2015-14)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following new set of rules comprising of MCR 9.200 *et seq*. are adopted, effective September 1, 2019.

[Current Rules 9.200 through 9.228 are rescinded and replaced with the following new rules.]

RULE 9.200. CONSTRUCTION.

An independent and honorable judiciary being indispensable to justice in our society, subchapter 9.200 shall be construed to preserve the integrity of the judicial system, to enhance public confidence in that system, and to protect the public, the courts, and the rights of

the judges who are governed by these rules in the most expeditious manner that is practicable and fair.

RULE 9.201. DEFINITIONS.

As used in this chapter, unless the context or subject matter otherwise requires

(A) "commission" means the Judicial Tenure Commission.

(B) "judge" means:

(1) a person who is serving as a judge or justice of any court of the judicial branch of state or local government by virtue of election, appointment, or assignment;

(2) a magistrate or a referee of any such court; or

(3) a person who formerly held such office if a request for investigation was filed during the person's term of office. If the person is no longer a judge and the alleged misconduct relates to the person's actions as a judge, it is not necessary that the request for investigation be filed during the former judge's term of office; nothing in this paragraph deprives the Attorney Grievance Commission of its authority to proceed against a former judge.

(C) "respondent" is a judge against whom a request for investigation has been filed.

(D) "chairperson" is the commission chairperson and includes the acting chairperson.

(E) "master" means one or more judges or former judges appointed by the Supreme Court at the commission's request to hold hearings on a complaint against a respondent.

(F) "disciplinary counsel" is the commission's executive director or other attorney appointed by the commission to act as the prosecutor in negotiating settlements, presenting evidence at the hearing on the

complaint, and in proceedings in the Supreme Court other than litigating a recommendation on a complaint made after a hearing before the commission.

(G) "commission counsel" is the attorney appointed by the commission to provide it with counsel whenever the commission appoints the executive director as disciplinary counsel, including acting in proceedings in the Supreme Court. The disciplinary counsel may not serve as the commission counsel in the same case.

(H) "request for investigation" is an allegation of judicial misconduct, physical or mental disability, or other circumstance that the commission may undertake to investigate under Const 1963, art 6, § 30, and MCR 9.220.

(I) "complaint" is a written document issued at the direction of the commission, alleging specific charges of misconduct in office, mental or physical disability, or some other ground that warrants action under Const 1963, art 6, § 30.

RULE 9.202. STANDARDS OF JUDICIAL CONDUCT.

(A) Responsibility of Judge. A judge is personally responsible for the judge's own behavior and for the proper conduct and administration of the court in which the judge presides.

(B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice. In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the

judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

(1) Misconduct in office includes, but is not limited to:

(a) persistent incompetence in the performance of judicial duties;

(b) persistent neglect in the timely performance of judicial duties;

(c) persistent failure to treat persons fairly and courteously;

(d) treatment of a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic;

(e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and

(f) failure to cooperate with a reasonable request made by the commission in its investigation of a respondent.

(2) Conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge, whether the conduct occurred before or after the respondent became a judge or was related to judicial office.

(3) In deciding whether action with regard to a judge is warranted, the commission shall consider all the circumstances, including but not limited to the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter and whether respondent has corrected the behavior.

RULE 9.210. JUDICIAL TENURE COMMISSION; ORGANIZATION.

(A) Appointment of Commissioners. As provided by Const 1963, art 6, § 30, the Judicial Tenure Commission consists of 9 persons. The commissioners selected by the judges shall be chosen by vote conducted by the state court administrator. The commissioners selected by the state bar members shall be chosen by vote conducted by the State Bar of Michigan. Both elections must be conducted in accordance with nomination and election procedures approved by the Supreme Court. Immediately after a commissioner's selection, the selecting authority shall notify the Supreme Court and the Judicial Tenure Commission.

(B) Term of Office. A commissioner's term of office shall be 3 years. To achieve staggered terms, the following terms shall expire in consecutive years:

(1) one of the appointments of the Governor, the judge of a court of limited jurisdiction, and one of the attorneys selected by the state bar;

(2) the other appointment of the Governor, the probate judge, and the other attorney selected by the state bar;

(3) the Court of Appeals judge, the circuit judge, and the judge selected by the state bar.

(C) Oath of Office. The following oath shall be administered to all members of the Judicial Tenure Commission:

"I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of this state, and that I will faithfully discharge the duties of the office of Judicial Tenure Commission member according to the best of my ability."

(D) Vacancy.

(1) A vacancy in the office of a commissioner occurs:

(a) when a commissioner resigns or is incapable of serving as a member of the commission;

(b) when a judge who is a member of the commission no longer holds the office held when selected;

(c) when an attorney selected by state bar members is no longer entitled to practice in the courts of this state; and

(d) when an appointee of the Governor becomes an attorney.

The commission shall notify the appointing authority of a vacancy.

(2) Vacancies must be filled by selection of a successor in the same manner required for the selection of the predecessor. The commissioner selected shall hold office for the unexpired term of the predecessor. Vacancies must be filled within 3 months after the vacancy occurs. If a vacancy occurs after the selection of a new commissioner but before that commissioner's term officially begins, the commissioner-elect shall fill that vacancy and serve the remainder of the unexpired term.

(3) A member may resign by submitting a resignation in writing to the commission, which must certify the vacancy to the selecting authority.

(E) Commission Expenses.

(1) The commission's budget must be submitted to the Supreme Court for approval.

(2) The commission's expenses must be included in and paid from the appropriation for the Supreme Court.

(3) A commissioner may not receive compensation for services but shall be paid reasonable and necessary expenses.

(F) Quorum and Chairperson.

(1) At its first meeting in odd-numbered years, the commission shall elect from among its members a chairperson, a vice-chairperson, and a secretary, each to serve 2 years. The vice-chairperson shall act as chairperson when the chairperson is absent. If both are absent, the members present may select one among them to act as temporary chairperson.

(2) A quorum for the transaction of business by the commission is 5.

(3) The vote of a majority of the members constitutes the adoption or rejection of a motion or resolution before the commission. The chairperson is entitled to cast a vote as a commissioner.

(4) Regular meetings at which no public hearing is scheduled may be held in person, by telephone, or by teleconference, provided that the telephone or teleconference method is a secure connection.

(G) Meetings of Commission. Meetings must be held at the call of the chairperson or the executive director, or upon the written request of 3 commission members.

(H) Commission Staff.

(1) The commission shall employ an executive director or equivalent person or persons, and such other staff members as the commission concludes are warranted, to perform the duties that the commission directs, subject to the availability of funds under its budget.

(2) The executive director, other disciplinary counsel, or any other person who is involved in the investigation or prosecution of a respondent

(a) shall not be present or participate in any manner in the decision of the commission to file a complaint, or during the deliberations of the commission to recommend action by the Supreme Court with regard to that respondent, and

(b) shall have no substantive ex parte communication with the commission regarding a complaint that the commission has authorized.

(3) Commission employees are exempt from the operation of Const 1963, art 11, § 5, as are employees of courts of record.

RULE 9.211. JUDICIAL TENURE COMMISSION; POWERS; REVIEW.

(A) Authority of Commission. The commission has all the powers provided for under Const 1963, art 6, § 30, and further powers provided by Supreme Court rule. Proceedings before the commission or a master are governed by these rules. The commission may adopt and publish internal operating procedures for its internal operation and the administration of its proceedings that do not conflict with this subchapter and shall submit them to the Supreme Court for approval.

(B) Review as an Appellate Court. The commission may not function as an appellate court to review the decision of a court or to exercise superintending or administrative control of a court, but may examine decisions incident to a request for investigation of judicial misconduct, disability, or other circumstance that the commission may undertake to investigate under Const 1963, art 6, § 30, and MCR 9.220. An erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct.

(C) Control of Commission Action. Proceedings under these rules are subject to the direct and exclusive superintending control of the Supreme Court. No other court has jurisdiction to restrict, control, or review the orders of the master or the commission.

(D) Errors and Irregularities. An investigation or proceeding under this subchapter may not be held

invalid by reason of a nonprejudicial irregularity or for an error not resulting in a miscarriage of justice.

(E) Jurisdiction Over Visiting Judges. Notwithstanding MCR 9.116(B), the Attorney Grievance Commission may take action immediately with regard to a visiting judge who currently holds no other judicial office if the allegations pertain to professional or personal activities unrelated to the judge's activities as a judge.

RULE 9.212. DISQUALIFICATION OF COMMISSION MEMBER OR EMPLOYEE.

(A) Disqualification from Participation. A judge who is a member of the commission or a justice of the Supreme Court is disqualified from participating in that capacity in proceedings involving the judge's or justice's own actions or for any reason set forth in MCR 2.003(C).

(B) Disqualification from Representation. A member or employee of the commission may not represent

(1) a respondent in proceedings before the commission, including preliminary discussions with employees of the commission before the filing of a request for investigation; or

(2) a judge in proceedings before the Attorney Grievance Commission, or the Attorney Discipline Board and its hearing panels, as to any matter that was pending before the Judicial Tenure Commission during the member's or the employee's tenure with the commission.

The law firm of an attorney member of the commission may not represent a respondent in proceedings before the commission, including preliminary discussions with employees of the commission before the filing of a request for investigation.

RULE 9.220. PRELIMINARY INVESTIGATION.

(A) Request for Investigation. A request for investigation of a judge must be made in writing and verified on oath of the grievant. The commission also is authorized to act on its own initiative or at the request of the Supreme Court, the Chief Justice, the state court administrator, or the Attorney Grievance Commission.

(B) Investigation. Upon receiving a request for investigation that is not clearly unfounded or frivolous, the commission shall direct that an investigation be conducted to determine whether a complaint should be filed and a hearing held.

(C) Adjourned Investigation. If a request for investigation is filed less than 90 days before an election in which the respondent is a candidate, and the request is not dismissed forthwith as clearly unfounded or frivolous, the commission shall postpone its investigation until after the election unless two-thirds of the commission members present or participating by telephone or teleconference determine that the public interest and the interests of justice require otherwise.

(D) Physical or Mental Examination. In the course of an investigation where a respondent's physical or mental condition is at issue, the commission may require the respondent to submit to a physical or mental examination. Failure of the respondent to submit to the examination may constitute judicial misconduct. MCR 2.311(B) is applicable to the examination.

(E) Expediting Matters. When the integrity of the judicial system requires, the Supreme Court may direct that the commission expedite its consideration of any investigation, and may set a deadline for the commission to submit any recommendation to the Court, notwithstanding any other provision in this subchapter.

RULE 9.221. EVIDENCE.

(A) Taking of Evidence During Investigation. The commission may take evidence before it or an individual member of the commission, or before the executive director or other member of the staff for purposes of the investigation.

(B) The commission may request that a respondent comment on any aspect of an investigation. The respondent shall have 21 days from the date of the request for comments to provide a response. The executive director may extend the response time for an additional 21 days. Any further request for additional time may only be granted by the commission or its chairperson for good cause shown. The respondent must sign the response, and that signature shall serve as the respondent's attestation as to the veracity of the respondent's response.

(C) Issuance of Subpoenas. The commission may issue subpoenas for the attendance of witnesses to provide statements or produce documents or other tangible evidence exclusively for consideration by the commission and its staff during the investigation. Before the filing of a complaint, the entitlement appearing on the subpoena shall not disclose the name of a respondent under investigation.

(D) Sanctions for Contempt; Disobedience by Respondent.

(1) Contempt proceedings against a nonparty for failure to obey a subpoena issued pursuant to this rule may be brought pursuant to MCR 2.506(E) in the circuit court for the county in which the individual resides, where the individual is found, where the contempt occurred, or where the hearing is to be held.

(2) If a respondent disobeys a subpoena or other lawful order of the commission or the master, whether before or during the hearing, the commission or the master may order such sanctions as are just, including, but not limited to, those set forth in MCR 2.313(B)(2)(a)-(e).

(E) Cooperation With Investigation. A judge, clerk, court employee, member of the bar, or other officer of a court must comply with a reasonable request made by the commission in its investigation. Failure to cooperate may be considered judicial misconduct or attorney misconduct. No court may charge the Judicial Tenure Commission for copying costs or certification costs, whether under MCL 600.2546 or otherwise, unless the Michigan Supreme Court specifically so authorizes.

RULE 9.222. FURTHER INVESTIGATION; THE "28-DAY LETTER."

(A) Before filing a complaint, the commission must give written notice to the respondent who is the subject of a request for investigation. The purpose of the notice is to afford the respondent an opportunity to apprise the commission, in writing within 28 days, of such matters as the respondent may choose, including information about the factual aspects of the allegations and other relevant issues. The notice shall specify the allegations and may include the date of the conduct, the location where the conduct occurred, and the name of the case or identification of the court proceeding relating to the conduct. The respondent shall sign the response and that signature shall serve as the respondent's attestation as to the veracity of the respondent's response.

(1) For good cause shown, the commission or its chairperson may grant a reasonable extension of the 28-day period.

(2) The Supreme Court may shorten the time periods prescribed in this and other provisions of this subchapter at its own initiative or at the request of the commission.

(B) In the commission's discretion, it may issue a "28-day letter" without having first requested the respondent's comments pursuant to MCR 9.221(B).

(C) The commission may continue to investigate until it issues a complaint, at which point the disciplinary counsel may continue investigating as needed.

(D) If a respondent requests in response to a written notice from the commission under this rule, the commission may offer the respondent an opportunity to appear informally before the commission to present such information as the respondent may choose, including information about the factual aspects of the allegations and other relevant issues.

RULE 9.223. CONCLUSION OF INVESTIGATION; NOTICE.

(A) If the commission determines at any time in the investigation that there are insufficient grounds to warrant filing a complaint, the commission may:

(1) dismiss the matter;

(2) dismiss the matter with a letter of explanation or caution that addresses the respondent's conduct;

(3) dismiss the matter with or without a letter of explanation or caution that addresses the respondent's conduct contingent upon the satisfaction of conditions imposed by the commission, which may include a period of monitoring;

(4) admonish the respondent; or

(5) recommend to the Supreme Court private censure, with a statement of reasons.

(B) Notice to Respondent. Before taking action under subrule (A)(2)-(5), the commission must first have given written notice to the respondent of the nature of the allegations in the request for investigation and afforded the respondent a reasonable opportunity to respond in writing, pursuant to MCR 9.221(B), MCR 9.222(A), or both.

(C) On final disposition of a request for investigation without the filing of a complaint, the commission shall give written notice of the disposition to the respondent who was the subject of the request. The commission also shall provide written notice to the grievant that the matter has been resolved without the filing of a complaint.

RULE 9.224. COMPLAINT.

(A) Upon determining that there is sufficient evidence to believe that the respondent under investigation has engaged in misconduct, the commission may issue a complaint against that respondent.

(B) If the commission issues a complaint, it shall appoint the executive director or another attorney to act as disciplinary counsel. If the executive director assumes the role of disciplinary counsel, the commission shall appoint outside counsel to act as commission counsel. If the commission appoints outside counsel to act as disciplinary counsel, the executive director shall serve as commission counsel.

(C) Upon issuing a complaint, the commission shall petition the Court for the appointment of a master.

RULE 9.225. INTERIM SUSPENSION.

(A) Petition.

(1) With the filing of a complaint, the commission may petition the Supreme Court for an order suspend-

ing a respondent from acting as a judge until final adjudication of the complaint.

(2) In extraordinary circumstances, the commission may petition the Supreme Court for an order suspending a respondent from acting as a judge in response to a request for investigation, pending a decision by the commission regarding the filing of a complaint. In such a circumstance, the documents filed with the Court must be kept under seal unless the petition is granted. Conviction of a felony is grounds for automatic interim suspension, with or without pay, pending action by the commission. If the respondent is suspended without pay, the respondent's pay shall be held in escrow pending the final resolution of disciplinary proceedings.

Whenever a petition for interim suspension is granted, the processing of the case shall be expedited in the commission and in the Supreme Court. The commission shall set forth in the petition an approximate date for submitting a final recommendation to the Court.

(3) Notwithstanding any other provision of this rule, in a matter in which a respondent poses a substantial threat of serious harm to the public or to the administration of justice, the commission may petition the Supreme Court for an order suspending a respondent from acting as a judge without pay in response to a request for investigation, pending a decision by the commission regarding the issuance of a complaint. The respondent's pay shall be held in escrow pending the final resolution of disciplinary proceedings.

Whenever a petition for interim suspension is granted, the processing of the case shall be expedited in the commission and in the Supreme Court. The commission shall set forth in the petition an approximate date for submitting a final recommendation to the Court.

(B) Contents; Affidavit or Transcript. The petition must be accompanied by a sworn affidavit or court transcript and state facts in support of the allegations and the assertion that immediate suspension is necessary for the proper administration of justice.

(C) Service; Answer. A copy of the petition and supporting documents must be served on the respondent, who may file an answer to the petition within 14 days after service of the petition, unless the commission has filed a motion for immediate consideration. The commission must be served with a copy of the answer.

RULE 9.230. PLEADINGS.

Other than motions, the complaint and answer are the only pleadings allowed.

(A) Complaint.

(1) Filing; Service. A complaint may not be issued before the completion of a preliminary investigation. Upon concluding that there is sufficient evidence to warrant the issuance of a complaint, the commission shall direct the executive director or equivalent staff member to do the following:

(a) enter the complaint in the commission docket, which is a public record;

(b) retain the complaint in the commission office; and

(c) promptly serve a copy of the complaint on the respondent.

(2) Form of Complaint. A complaint must be entitled:

"Complaint Against _____, Judge. No. _____."

A complaint must be in form similar to a complaint filed in a civil action in the circuit court.

(B) Answer.

(1) Filing. Within 14 days after service of the complaint, the respondent must file with the commission the original and 9 copies of an answer verified by the respondent.

(2) Form. The answer must be in form similar to an answer in a civil action in the circuit court and must contain a full and fair disclosure of all facts and circumstances pertaining to the allegations regarding the respondent. Willful concealment, misrepresentation, or failure to file an answer and disclosure are additional grounds for disciplinary action under the complaint.

(3) Affirmative defenses, including the defense of laches, must be asserted in the answer or they will not be considered.

RULE 9.231. APPOINTMENT OF MASTER.

(A) The Supreme Court shall appoint a master to conduct the hearing within a reasonable period of the date of the petition and shall establish a date for completion of the hearing procedure.

(B) The master shall set a time and a place for the hearing and shall notify the respondent and the examiner at least 28 days in advance. The master shall rule on all motions and other procedural matters incident to the complaint, answer, and hearing. Recommendations on dispositive motions shall not be announced until the conclusion of the hearing, except that the master may refer to the commission on an interlocutory basis a recommendation regarding a dispositive motion.

(C) The master may conduct one or more pretrial conferences, and may order a prehearing conference to obtain admissions or otherwise narrow the issues presented by the pleadings.

(D) Unless the parties agree to waive them, closing arguments at the hearing before the master shall be oral and take place upon conclusion of the presentation of evidence. The master may not adjourn or postpone closing arguments for the preparation of a transcript or the submission of proposed findings of fact.

(E) MCR 2.003(B) shall govern all matters concerning the disqualification of a master.

RULE 9.232. DISCOVERY.

(A) Pretrial or discovery proceedings are not permitted, except as follows:

(1) At least 21 days before a scheduled public hearing,

(a) the parties shall provide to one another, in writing, the names and addresses of all persons whom they intend to call at the hearing, a copy of all statements and affidavits given by those persons, and any material in their possession that they intend to introduce as evidence at the hearing, and

(b) the disciplinary counsel or executive director shall provide to the respondent copies of all exculpatory material in its possession.

(2) The parties shall give supplemental notice to one another within 5 days after any additional witness or material has been identified and at least 10 days before a scheduled hearing.

(B) A deposition may be taken of a witness who is living outside the state or who is unable to attend a hearing, or otherwise as allowed for good cause shown.

(C) If a party fails to comply with subrules (A) or (B), the master may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(e).

RULE 9.233. PUBLIC HEARING.

(A) Procedure. The public hearing must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court. A respondent is entitled to be represented by an attorney. Disciplinary counsel shall present the evidence in support of the charges set forth in the complaint and at all times shall have the burden of proving the allegations by a preponderance of the evidence. Any employee, officer, or agent of the respondent's court, law enforcement officer, public officer or employee, or attorney who testifies as a witness in the hearing, whether called by the disciplinary counsel or by the respondent, is subject to cross-examination by either party as an opposite party under MCL 600.2161.

(B) Effect of Failure to Comply.

(1) If the respondent is in default for not having filed a timely answer or fails to attend the proceedings without being excused by the master, the commission, or the court, the allegations set forth in the complaint shall be deemed admitted, taken as true, and may form the basis for the master to make findings of fact.

(2) The respondent's failure to testify in his or her own behalf or to submit to a medical examination requested by the commission or the master may be considered as an evidentiary fact, unless the failure was due to circumstances unrelated to the facts in issue at the hearing.

(C) Record. The proceedings at the hearing must be recorded by stenographic or mechanical means. If the master declines to admit evidence, a separate record shall be made so that the commission and/or the court may consider that evidence and determine whether to include it in the record.

RULE 9.234. SUBPOENAS.

(A) Issuance of Subpoenas. The attorneys may issue subpoenas for the attendance of witnesses or the production of documents or other tangible evidence.

(B) Sanctions for Contempt; Disobedience by Respondent.

(1) Contempt proceedings against a nonparty for failure to obey a subpoena issued pursuant to this rule may be brought pursuant to MCR 2.506(E) in the circuit court for the county in which the individual resides, in which the individual is found, in which the contempt occurred, or in which the hearing is to be held.

(2) If a respondent disobeys a subpoena or other lawful order of the commission or the master, whether before or during the hearing, the commission or the master may order such sanctions as are just, including, but not limited to, those set forth in MCR 2.313(B)(2)(a)-(e).

RULE 9.235. AMENDMENTS OF COMPLAINT OR ANSWER.

The master, before the conclusion of the hearing, or the commission, before its determination, may allow or require amendments of the complaint or the answer. The complaint may be amended to conform to the proofs or to set forth additional facts, whether occurring before or after the commencement of the hearing. If an amendment is made, the respondent must be given reasonable time to answer the amendment and to prepare and present a defense against the matters charged in the amendment. A "28-day letter" is not required to amend a complaint.

RULE 9.236. REPORT OF MASTER.

The court reporter shall prepare a transcript of the proceedings conducted before the master within 21

days of the conclusion of the hearing, filing the original with the commission, and serving copies on the respondent (or the respondent's attorney) and disciplinary counsel, by e-mail. Within 21 days after a transcript of the proceedings is provided, the master shall prepare and transmit to the commission a report that contains a brief statement of the proceedings and findings of fact and conclusions of law with respect to the issues presented by the complaint and the answer. On receiving the report, the commission must promptly send a copy to the respondent, unless the master has already done so.

RULE 9.240. OBJECTIONS TO REPORT OF MASTER.

Within 28 days after the master's report is mailed to the respondent, disciplinary counsel or the respondent may file with the commission an original and 9 copies of a brief in support of or in opposition to all or part of the master's report. The briefs must include a discussion of possible sanctions and, except as otherwise permitted by the commission, are limited to 50 pages in length. A copy of the brief must be served on the opposite party, who shall have 14 days to respond.

RULE 9.241. APPEARANCE BEFORE COMMISSION.

When the hearing before the master has concluded, the commission shall set a date for hearing objections to the report. Both the respondent and the disciplinary counsel may present oral argument at the hearing before the commission.

RULE 9.242. EXTENSION OF TIME.

For good cause shown, the commission or its chairperson may extend for periods not to exceed 28 days the time for the filing of an answer, for the commence-

ment of a hearing before the commission, for the filing of the master's report, and for the filing of a statement of objections to the report of a master.

RULE 9.243. HEARING ADDITIONAL EVIDENCE.

The commission may order a hearing before itself or the master for the taking of additional evidence at any time while the complaint is pending before it. The order must set the time and place of hearing and indicate the matters about which evidence is to be taken. A copy of the order must be sent to the respondent at least 14 days before the hearing.

RULE 9.244. COMMISSION DECISION.

(A) Majority Decision.

(1) The affirmative vote of 5 commission members who have considered the report of the master and any objections, and who were present at an oral hearing provided for in MCR 9.241, or have read the transcript of that hearing, is required for a recommendation of action with regard to a respondent. A commissioner may file a written dissent.

(2) It is not necessary that a majority agree on the specific conduct that warrants a recommendation of action with regard to a respondent, or on the specific action that is warranted, only that there was some conduct that warrants such a recommendation.

(B) Record of Decision.

(1) The commission must make written findings of fact and conclusions of law along with its recommendations for action with respect to the issues of fact and law in the proceedings, but may adopt the findings of the master, in whole or in part, by reference. The commission's report must include a list of all respondent's prior disciplinary actions under MCR 9.223(A)(2)-(5) or MCR

9.224 and must include an acknowledgment that the commission has included its consideration of any prior discipline in the commission's recommended action. The list of previous disciplinary actions shall be submitted under seal and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

(2) The commission shall undertake to ensure that the action it is recommending in individual cases is reasonably proportionate to the conduct of the respondent and reasonably equivalent to the action that has been taken previously in equivalent cases.

RULE 9.245. CONSENT AGREEMENTS.

(A) Consent Agreements. At any time, the respondent and the disciplinary counsel (or the executive director acting as the putative disciplinary counsel) may enter into confidential negotiations. A consent agreement may

(1) include stipulated facts and an agreement as to the sanction; or

(2) include just the stipulated facts, with no agreement as to the sanction.

The parties may present a signed consent agreement to the commission, which shall review the matter and decide whether to accept it. If the consent agreement is filed under subsection (1), the parties do not file briefs and the matter is not set on the docket for argument following the commission's decision, unless otherwise directed by the Court. If the consent agreement is filed under subsection (2), the matter proceeds pursuant to MCR 9.250 and MCR 9.251.

(B) Commission Action. If the commission agrees to the terms set forth in the consent agreement in subsec-

tion (1), the commission shall issue a decision and recommendation as if there had been a master's report filed. If the commission agrees to the terms set forth in the consent agreement in subsection (2), the stipulated facts serve in lieu of a master's report and the matter then proceeds to a hearing before the commission, with the briefing schedule and an appearance before the commission, as set forth in MCR 9.240 and MCR 9.241. The time for filing a brief before the commission in matters filed under subsection (2) shall start with the filing of the consent agreement. A copy of the consent agreement shall be attached to the commission's decision. The commission's recommendation must include its rationale for accepting the consent agreement as well as a list of all respondent's prior disciplinary actions under MCR 9.223(A)(2)-(5) or MCR 9.224 and must include an acknowledgment that the commission has included its consideration of any prior discipline in the commission's recommended action. The list of previous disciplinary actions shall be submitted under seal and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

(C) Prior or pending discipline actions. As part of a proposed consent agreement, the parties shall submit a list of all pending or previous disciplinary action taken against the respondent, sufficient information to understand the context of the individual circumstances, and the disposition of each incident. For purposes of this rule, "disciplinary actions" include any disposition other than a dismissal under MCR 9.223(A)(1), including nonsanctions under MCR 9.223(A)(2)-(5). The parties also shall include information about actions initiated against the respondent in proceedings other than disciplinary actions, including court cases for superintend-

ing control, criminal proceedings, internal discipline actions, or any other allegations of judicial misconduct. The list of previous disciplinary actions shall be submitted under seal and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

(D) Action With Respondent's Consent. With the consent of the respondent and the commission, the Supreme Court may impose a sanction or take other action at any stage of the proceedings under these rules.

(E) Confidentiality. A consent agreement submitted to the commission shall not be made public until after the commission has accepted its terms and the Court has approved it.

RULE 9.250. FILING AND SERVICE OF DOCUMENTS AFTER COMMISSION'S DECISION.

(A) Within 21 days after issuing its decision and recommendation, the commission must file in the Supreme Court:

(1) the original record arranged in chronological order and indexed and certified;

(2) one copy of the order; and

(3) a proof of service on the respondent.

(B) The commission must serve the respondent with:

(1) notice of the filing under MCR 9.250(A)(1);

(2) 2 copies of the order;

(3) 2 copies of the index to the original record; and

(4) a copy of a portion of the original record not submitted by or previously furnished to the respondent.

If the commission files electronically, then the applicable court rules governing electronic filing apply.

RULE 9.251. REVIEW BY SUPREME COURT.

(A) Petition by Respondent. Within 28 days after being served, a respondent may file in the Supreme Court one copy of

(1) a petition to reject or modify the commission's recommendation, which must:

(a) be based on the record,

(b) specify the grounds relied on,

(c) be verified, and

(d) include a brief in support; and

(2) an appendix presenting portions of the record that the respondent believes necessary to fairly judge the issues.

The respondent must serve the commission with one copy of the petition and one copy of the appendix and file proof of that service. If the respondent files electronically, then the applicable rules governing electronic filing apply.

(B) Role of Commission Counsel and Disciplinary Counsel. If a respondent submits a petition under subsection (A), commission counsel shall appear on behalf of the commission, submit the brief of the commission under subrule (C), and shall advocate only for the position recommended by the commission. Filing of documents with the commission shall be deemed service on commission counsel. Disciplinary counsel's involvement in the case is ended, unless the matter is remanded for further proceedings before the commission or master.

(C) Brief of Commission. Within 21 days after respondent's petition is served, the commission must file

(1) one copy of a reply brief, and

(2) proof that the respondent was served with one copy of the brief.

The commission may file one copy of an appendix containing portions of the record not included in the respondent's appendix that the commission believes necessary to fairly judge the issues. If the disciplinary counsel files electronically, then the applicable rules governing electronic filing apply.

(D) Review in Absence of Petition by Respondent. If the respondent does not file a petition, the Supreme Court will review the commission's recommendation on the record file. The Supreme Court may order that briefs be filed or arguments be presented.

(E) Form of Briefs. A brief filed under this subrule is to be similar to a brief filed in an appeal to the Supreme Court.

(F) Additional Evidence. The Supreme Court may, if cause is shown, order that further evidence be taken and added to the original record.

(G) Submission. The clerk will place the case on a session calendar under MCR 7.313. Oral argument may be requested.

RULE 9.252. DECISION BY SUPREME COURT.

(A) The Supreme Court shall review the record of the proceedings and file a written opinion and judgment, which may accept or reject the recommendations of the commission or modify the recommendations by imposing a greater, lesser, or entirely different sanction. When appropriate, the Court may remand the matter to the commission for further proceedings, findings, or explication.

(B) If the commission issues a decision based on a consent agreement between the respondent and the disciplinary counsel under subrule 9.245(A)(1) and the Court determines to impose a greater, lesser, or entirely different sanction, the respondent shall be af-

forded the opportunity to withdraw the consent and the matter shall be remanded to the commission for further proceedings.

RULE 9.253. MOTION FOR REHEARING.

Unless the Supreme Court directs otherwise, the respondent may file a motion for rehearing within 14 days after the filing of the decision. If the Supreme Court directs in the decision that a motion for rehearing may not be filed, the decision is final on filing.

RULE 9.260. SERVICE.

(A) Respondent. When provision is made under these rules for serving a complaint or other document on a respondent, the service must be made in person or by registered or certified mail or through an overnight delivery service to the respondent's judicial office or last known residence. If an attorney has appeared for a respondent, service may be on the attorney in lieu of service on the respondent.

(B) Commission. Service on the commission must be made by personal delivery or by registered or certified mail or through an overnight delivery service to the executive director at the commission's office.

(C) Disciplinary Counsel. Service on the disciplinary counsel must be made by personal delivery or by registered or certified mail or through an overnight delivery service to the disciplinary counsel at that individual's address on record with the state bar.

(D) Alternative Service. The respondent, the respondent's attorney, the executive director, disciplinary counsel, and/or commission counsel may serve one another via e-mail with a paper copy being sent via regular mail to the individual's address on record with the state bar.

RULE 9.261. CONFIDENTIALITY; DISCLOSURE.

(A) Scope of Rule. Except as provided in this rule, all papers filed with the commission and all proceedings before it are confidential in nature and are absolutely privileged from disclosure by the commission or its staff, including former members and employees, in any other matter, including but not limited to civil, criminal, legislative, or administrative proceedings. All the commission's investigative files and commission-generated documents are likewise confidential and privileged from disclosure. Nothing in this rule prohibits the respondent from making statements regarding the respondent's conduct.

(B) Before Filing a Complaint.

(1) Before a complaint is filed, neither a commissioner nor a member of the commission staff may disclose the existence or contents of an investigation, testimony taken, or papers filed in it, except as needed for investigative purposes.

(2) The commission may at any time make public statements as to matters pending before it on its determination by a majority vote that it is in the public interest to do so, limited to statements

(a) that there is an investigation pending,

(b) that the investigation is complete and there is insufficient evidence for the commission to file a complaint, or

(c) with the consent of the respondent, that the investigation is complete and some specified disciplinary action has been taken.

(C) Discretionary Waiver of Confidentiality or Privilege. The commission may waive the confidentiality or privilege protections if:

(1) the respondent waives, in writing, the right to confidentiality or privilege;

(2) the grievant waives, in writing, the right to confidentiality or privilege;

(3) the witness whose statement, testimony, or other evidentiary item will be disclosed waives, in writing, the right to confidentiality or privilege; and

(4) a majority of the commission determines that the public interest will be served by doing so.

(D) After Filing of Complaint

(1) When the commission issues a complaint, the following shall not be confidential or privileged:

(a) the complaint and all subsequent pleadings filed with the commission or master, all stipulations entered, all findings of fact made by the master or commission, and all reports of the master or commission; however, all papers filed with and proceedings before the commission during the period preceding the issuance of a complaint remain confidential and privileged except where offered into evidence in a formal hearing; and

(b) the formal hearing before the master or commission, and the public hearing provided for in MCR 9.241.

(2) This subrule neither limits nor expands a respondent's right to discovery under MCR 9.232.

(3) The confidentiality or privilege of any otherwise nonpublic disciplinary action is waived in any proceeding on a concurrent or subsequent complaint.

(E) Disclosure to Grievant. Upon completion of an investigation or proceeding on a complaint, the commission shall disclose to the grievant that the commission

(1) has found no basis for action against the respondent or determined not to proceed further in the matter,

(2) has taken an appropriate corrective action, the nature of which shall not be disclosed, or

(3) has recommended that the respondent be publicly censured, suspended, removed, or retired from office.

(F) Public Safety Exception. When the commission receives information concerning a threat to the safety of any person or persons, information concerning such person may be provided to the person threatened, to persons or organizations responsible for the safety of the person threatened, and to law enforcement or any appropriate prosecutorial agency.

(G) Disclosure to State Court Administrator.

(1) The commission may refer to the state court administrator requests for investigation and other communications received by the commission concerning the conduct of a judge if, in the opinion of the commission, the communications are properly within the scope of the duties of the administrator. The commission may provide the administrator with files, records, investigations, and reports of the commission relating to the matter. Such a referral does not preclude action by the commission if the judge's conduct is of such a nature as to constitute grounds for action by the commission or cannot be adequately resolved or corrected by action of the administrator.

(2) The commission may disclose to the administrator, upon request, the substance of files and records of the commission concerning a former judge who has been or may be assigned judicial duties by the administrator; a copy of the information disclosed must be furnished to the judge.

(H) Disclosure to Attorney Grievance Commission. Notwithstanding the prohibition against disclosure in this rule, the commission shall disclose information

concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action under Const 1963, art 6, § 30, to the Attorney Grievance Commission upon request. Absent a request, the commission may make such disclosure to the Attorney Grievance Commission. In the event of a dispute concerning the release of information, either the Attorney Grievance Commission or the Judicial Tenure Commission may petition the Supreme Court for an order resolving the dispute.

(I) Disclosure to Chief Judge. Notwithstanding the prohibition against disclosure in this rule, and except for those situations that involve a dismissal with explanation, the commission shall notify the chief judge of a court when the commission has taken action under MCR 9.223(A)(2)-(5) involving a magistrate or referee of that court. Upon the chief judge's request, the referee or magistrate shall provide the chief judge with a copy of the commission's written notice of disposition.

RULE 9.262. RECORD RETENTION.

The commission shall develop a record-retention policy, which shall include a description of the materials that are to be stored, a list of the time for which specific materials must be maintained, and procedures for the disposal of records.

RULE 9.263. IMMUNITY.

A person is absolutely immune from civil suit for statements and communications transmitted solely to the commission, its employees, or its agents, or given in an investigation or proceeding on allegations regarding a respondent, and no civil action predicated upon the statements or communications may be instituted against a grievant, a witness, or his or her counsel. Members of the commission and their employees and

agents, masters, disciplinary counsel, and commission counsel are absolutely immune from civil suit for all conduct in the course of their official duties.

RULE 9.264. ETHICS MATERIALS AND PROGRAMS.

The commission shall work with other groups and organizations, including the State Bar of Michigan, to develop educational materials and programs that are designed to assist judges in maintaining an awareness and understanding of their ethical obligations.

Further, the Court amends JTC IOP No. 9.202(G) as follows:

IOP 9.202(G)-1 — Commission Employees are "At Will" Employees. The executive director and all other Commission employees are "at will" employees, serving at the pleasure of the Commission. The Commission shall conduct an annual performance review of the executive director. No attorney employed by the Commission may engage in the practice of law outside the attorney's employment relationship with the Commission.

Staff Comment: This new version of MCR 9.200 *et seq*. reflects a reorganization suggested by the Judicial Tenure Commission, and includes various technical changes to update and modernize the rules.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 1, 2019, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the following amendment is adopted, effective immediately. The amendment of Rule 4.201 included in the order issued on March 20, 2019, effective May 1, 2019, is replaced with the following amendment.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(B) [Unchanged.]

(C) Summons.

(1) [Unchanged.]

(2) The summons must also include the following advice to the defendant:

(a)-(c) [Unchanged.]

(d) The defendant has a right to a jury trial which will be lost unless it is demanded in the first defense response, written or oral. The jury trial fee must be paid when the demand is made, unless payment of fees is waived ~~or suspended~~ under MCR 2.002.

(D) Service of Process. A copy of the summons and complaint and all attachments must be served on the defendant by mail. Unless the court does the mailing and keeps a record, the plaintiff must perfect the mail service by attaching a postal receipt to the proof of service. In addition to mailing, the defendant must be served in one of the following ways:

(1) [Unchanged.]

(2) By delivering the ~~papers~~documents at the premises to a member of the defendant's household who is

(a)-(b) [Unchanged.]

(c) asked to deliver the ~~papers~~documents to the defendant; or

(3) After diligent attempts at personal service have been made, by securely attaching the ~~papers~~documents to the main entrance of the tenant's dwelling unit. A return of service made under this subrule ~~(D)(3)~~

must list the attempts at personal service. Service under this subrule ~~(D)(3)~~ is effective only if a return of service is filed showing that, after diligent attempts, personal service could not be made. An officer who files proof that service was made under this subrule ~~(D)(3)~~ is entitled to the regular personal service fee.

(E) [Unchanged.]

(F) Appearance and Answer; Default.

(1) Appearance and Answer. The defendant or the defendant's attorney must appear and answer the complaint by the date on the summons. Appearance and answer may be made as follows:

(a) [Unchanged.]

(b) By orally answering each allegation in the complaint at the hearing. The answers must be recorded ~~or noted on the complaint~~.

(2)-(5) [Unchanged.]

(G)-(O) [Unchanged.]

Staff Comment: The amendments in this order include only the nonsubstantive changes of MCR 4.201 that were incorporated in the order that entered on March 20, 2019. In response to concerns raised by numerous commenters that the new rule would make it difficult to ensure defendants were served timely with the summons and complaint, the rule now will remain largely unchanged for further discussion and input, with an expectation that this issue and others will be addressed in a future set of proposed court rule revisions.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantial determination by this Court.

Adopted May 15, 2019, effective September 1, 2019 (File No. 2017-27)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a

public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.425 of the Michigan Court Rules is adopted, effective September 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(D) [Unchanged.]

(E) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

(a)-(d) [Unchanged.]

(e) if the sentence imposed is not within the guidelines range, articulate the ~~substantial and compelling~~ reasons justifying that specific departure, and

(f) [Unchanged.]

(2)-(3) [Unchanged.]

(F) Advice Concerning the Right to Appeal; Appointment of Counsel.

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a)-(b) [Unchanged.]

(c) the request for a lawyer must be filed~~made within 42 days after sentencing~~.

(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a)-(b) [Unchanged.]

(c) the request for a lawyer must be filed~~made~~ within 42 days after sentencing.

(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and filed~~returned to the court~~ within 42 days after sentencing if the defendant wants the court to appoint a lawyer. The court must give the defendant an opportunity to tender a completed request for counsel form at sentencing if the defendant wishes to do so.

(4) A request for counsel must be deemed filed on the date on which it is received by the court or the Michigan Appellate Assigned Counsel System (MAACS), whichever is earlier.

(5~~4~~) [Renumbered but otherwise unchanged.]

(G) Appointment of Lawyer and Preparation of Transcript; Scope of Appellate Lawyer's Responsibilities.

(1) Appointment of Lawyer and Preparation of Transcript.

(a) All requests for the appointment of appellate counsel must be granted or denied on forms approved by the State Court Administrative Office and provided by ~~through the Michigan Appellate Assigned Counsel System (MAACS).~~

(b)-(d) [Unchanged.]

(e) In a case involving a conviction following a trial, if the defendant's request for a lawyer was filed~~made~~ within the time for filing a claim of appeal, the order must be entered on an approved form entitled "Claim of Appeal and Appointment of Counsel." Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

(f)-(g) [Unchanged.]

(2) [Unchanged.]

Staff Comment: The amendment of MCR 6.425 makes the rule consistent that requests for counsel must be completed and filed with the court or submitted to MAACS within 42 days after sentencing and allows defendants the opportunity to tender a completed form at sentencing. It also removes the requirement for a sentencing judge to articulate substantial and compelling reasons to deviate from the guidelines range, pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 22, 2019, effective September 1, 2019 (File No. 2017-17)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 6.001, 6.006, 6.425, 6.427, and 6.610 and the addition of Rule 6.430 of the Michigan Court Rules are adopted, effective September 1, 2019.

[Rule 6.430 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULE AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(E)(3), 6.427, 6.430, 6.435,

6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

RULE 6.006. VIDEO AND AUDIO PROCEEDINGS.

(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, ~~and~~ waivers and adjournments of preliminary examinations, and hearings on postjudgment motions to amend restitution.

(B)-(D) [Unchanged.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(D) [Unchanged.]

(E) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

(a)-(e) [Unchanged.]

(2) Resolution of Challenges.

(a) If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged

information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(i~~a~~) correct or delete the challenged information in the report, whichever is appropriate, and

(ii~~b~~) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

(b) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

(3) [Unchanged.]

(F)-(G) [Unchanged.]

RULE 6.427. JUDGMENT.

Within 7 days after sentencing, the court must date and sign a written judgment of sentence that includes:

(1)-(8) [Unchanged.]

(9) the conditions incident to the sentence; ~~and~~

(10) whether the conviction is reportable to the Secretary of State pursuant to statute, and, if so, the defendant's Michigan driver's license number~~.~~; and

(11) the dollar amount of restitution that the defendant is ordered to pay.

If the defendant was found not guilty or for any other reason is entitled to be discharged, the court must enter judgment accordingly. The date a judgment is signed is its entry date.

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing.

(1) For sentencing, the court shall:

(a)-(c) [Unchanged.]

(d) order the dollar amount of restitution that the defendant must pay to make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate. Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

(2)-(4) [Unchanged.]

(G)-(H) [Unchanged.]

RULE 6.430. POSTJUDGMENT MOTION TO AMEND RESTITUTION.

(A) The court may amend an order of restitution entered under this section on a motion filed by the prosecuting attorney, the victim, or the defendant based upon new or updated information related to the injury, damages, or loss for which the restitution was ordered.

(B) Filing. The moving party must file the motion and a copy of the motion with the clerk of the court in which the defendant was convicted and sentenced. Upon receipt of a motion, the clerk shall file it under the same case number as the original conviction. If an appeal is pending when the motion is filed, the moving party must serve a copy on the appellate court.

(C) Service and Notice of Hearing. If the defendant is the moving party, he/she shall serve a copy of the motion and notice of its filing on the prosecuting attorney and the prosecutor shall then serve a copy of

the motion and notice upon the victim. If the prosecutor is the moving party, he/she shall serve a copy of the motion and notice of its filing on the defendant and the victim. If the victim is the moving party, he/she shall serve a copy of the motion and notice of its filing on the defendant and the prosecutor. The home address, home telephone number, work address, and work telephone number of the victim, if included on a motion to amend restitution, is nonpublic. The non-moving party is permitted but not required to respond. Any response to the motion shall comply with the time for service of the response as provided in MCR 2.119(C)(2). The court shall provide written notice of hearing on the motion to the defendant and prosecutor. The prosecutor shall then serve notice of hearing upon the victim.

(D) Appearance. As permitted by MCR 6.006(A), the court may allow the defendant to appear by two-way interactive video technology to conduct the proceeding between a courtroom and a prison, jail, or other location.

(E) Ruling. The court, in writing, shall enter an appropriate order disposing of the motion and, if the motion is granted, enter an order amending the restitution. If an appeal was pending when the motion was filed, the moving party must provide a copy of the order to the appellate court.

(F) Appeal. An appeal from this subsection is processed as provided by MCR 7.100 *et seq*., and 7.200 *et seq*.

Staff Comment: The amendments more explicitly require restitution to be ordered at the time of sentencing as required by statute, and establish a procedure for modifying restitution amounts.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 22, 2019, effective January 1, 2021 (File No. 2017-28) —REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.109 and 8.119 of the Michigan Court Rules are adopted, effective January 1, 2021.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1) Form and Captions of Documents.

(a)-(f) [Unchanged.]

~~(g) Pursuant to Administrative Order No. 2006-2, a filer is prohibited from filing a document that contains another person's social security number except when the number is required or allowed by statute, court rule, court order, or for purposes of collection activity when it is required for identification.~~

(2)-(8) [Unchanged.]

(9) Personal Identifying Information.

(a) The following personal identifying information is protected and shall not be included in any public document or attachment filed with the court except as provided by these rules:

(i) date of birth,

(ii) social security number or national identification number,

(iii) driver's license number or state-issued personal identification card number,

(iv) passport number, and

(v) financial account numbers.

(b) Filing, Accessing, and Serving Personal Identifying Information

(i) All protected personal identifying information listed in this rule that is required by law or court rule to be filed with the court or that is necessary to the court for purposes of identifying a particular person in a case must be provided to the court in the form and manner established by the State Court Administrative Office.

(ii) Where a social security number is required to be filed with the court, it shall be the last four digits only. This requirement does not apply to documents required to be filed with the friend of the court that are not placed in the court's legal file under MCR 8.119(D).

(iii) If a party is required to include protected personal identifying information in a public document filed with the court, the party shall file the document with the protected personal identifying information redacted, along with a personal identifying information form approved by the State Court Administrative Office under subrule (i). The personal identifying information form must identify each item of redacted information and specify an appropriate reference that uniquely corresponds to each item of redacted information listed. All references in the case to the redacted identifiers listed in the personal identifying information form will be understood to refer to the corresponding complete identifier. A party may amend the personal identifying information form as of right. Fields

for protected personal identifying information will not be included in SCAO-approved court forms.

(iv) Protected personal identifying information provided under this subrule is nonpublic and available, as required for case activity or as otherwise authorized by law or these court rules, only to the parties to the case; interested persons as defined in these court rules; and other persons, entities, or agencies entitled by law or these court rules to access nonpublic records filed with the court.

(v) A party may stipulate in writing to allow access to his or her protected personal identifying information to any person, entity, or agency.

(vi) A party or a court is not exempt from the requirement to serve a nonpublic document containing protected personal identifying information that has been filed with the court under subrule (i), except by court order in accordance with subule (vii).

(vii) Upon a finding of just cause, on the court's own motion or on motion of the party, the court may order any personal identifying information be made confidential. The order shall identify the party, person, or entity to whom access is restricted. If a party's home address or telephone number is made confidential, the order shall designate an alternative address for serving documents on that party or provide an alternative telephone number for making contact with that party for purposes of case activity.

(c) Local court forms shall not contain fields for protected personal identifying information. A court shall not reject a document for filing, dismiss a case, or take other negative action against a party for failure to file protected personal identifying information on a local court form.

(d) Failure to Comply.

(i) A party waives the protection of personal identifying information as to the party's own protected information by filing it in a public document and not providing it in the form and manner established under this rule.

(ii) If a party fails to comply with the requirements of this rule, the court may, upon motion or its own initiative, seal the improperly filed documents and order new redacted documents to be prepared and filed.

(e) Protected personal identifying information provided to the court as required by subrule (c) shall be entered into the court's case management system in accordance with standards established by the State Court Administrative Office. The information shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history under MCR 8.119(D)(1).

(10) Request for Copy of Public Document with Protected Personal Identifying Information; Redacting Personal Identifying Information; Responsibility; Certifying Original Record; Other.

(a) The responsibility for excluding or redacting personal identifying information listed in subrule (9) from all documents filed with or offered to the court rests solely with the parties and their attorneys. The clerk of the court is not required to review, redact, or screen documents at time of filing for personal identifying information, protected or otherwise, whether filed electronically or on paper.

(b) Dissemination of social security numbers by the courts is restricted to the purposes for which its use is authorized by federal or state law. When a court

receives a request for copies of any public document filed on or after March 1, 2006, the court must review the document and redact all social security numbers on the copy. This requirement does not apply to certified copies or true copies when they are required by law, or copies made for those uses for which the social security number was provided.

(c) Redacting Personal Identifying Information.

(i) Protected personal identifying information contained in a document and filed with the court shall be redacted by the clerk of the court on written request by the person to whom it applies. The clerk of the court shall process the request promptly. The request does not require a motion fee, must specify the protected personal identifying information to be redacted, and shall be maintained in the case file as a nonpublic document.

(ii) Personal identifying information that is not protected as identified in this rule may also be redacted or made confidential or nonpublic. The party or person whose personal identifying information is in a public document filed with the court may file an ex parte motion asking the court to direct the clerk to redact the information from that document or to make the information either confidential or nonpublic. The court may schedule a hearing on the motion at its discretion. The court shall enter such an order if the party or person's privacy interest outweighs the public's interest in the information. The motion shall be on a form approved by the state court administrative office, must specify the personal identifying information to be redacted, and shall be maintained in the case file as a nonpublic document.

(iii) A party or person whose protected personal identifying information is in an exhibit offered for hearing or trial may file a written request that the

information be redacted. The request does not require a motion fee, must specify the protected personal identifying information to be redacted, and shall be maintained in the case file as a nonpublic document. The court shall enter such an order if the party or person's privacy interest outweighs the public's interest in the information.

(d) Certifying a Record. The clerk of the court may certify a redacted record as a true copy of an original record on file with the court by stating that information has been redacted in accordance with law or court rule, or sealed as ordered by the court.

(e) Maintenance of Redacted or Restricted Access Personal Identifying Information. A document from which personal identifying information has been redacted shall be maintained in accordance with standards established by the State Court Administrative Office.

(E)-(G) [Unchanged.]

(H) Definitions. The following definitions apply to case records as defined in MCR 8.119(D) and (E).

(1) "Confidential" means that a case record is nonpublic and accessible only to those individuals or entities specified in statute or court rule. A confidential record is accessible to parties only as specified in statute or court rule.

(2) "Nonpublic" means that a case record is not accessible to the public. A nonpublic case record is accessible to parties and only those other individuals or entities specified in statute or court rule. A record may be made nonpublic only pursuant to statute or court rule. A court may not make a record nonpublic by court order.

(3) "Redact" means to obscure individual items of information within an otherwise publicly accessible document.

(4) "Redacted document" means a copy of an original document in which items of information have been redacted.

(5) "Sealed" means that a document or portion of a document is sealed by court order pursuant to MCR 8.119(I). Except as required by statute, an entire case may not be sealed.

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(C) [Unchanged.]

(D) Records Kept by the Clerk of the Court. The clerk of the court shall maintain the following case records in accordance with the Michigan Trial Court Records Management Standards. Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court pursuant to subrule (I) must be designated accordingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court under subrule (I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed.

(1) [Unchanged.]

(a) Case History. The clerk shall create and maintain a case history of each case, known as a register of actions, in the court's automated case management system. The automated case management system shall be capable of chronologically displaying the case history for each case and shall also be capable of searching a

case by number or party name (previously known as numerical and alphabetical indices) and displaying the case number, date of filing, names of parties, and names of any attorneys of record. The case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court Records Management Standards. Each entry shall be brief, but shall show the nature of each item filed, each order or judgment of the court, and the returns showing execution. Each entry shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action. Protected personal identifying information entered into the court's case management system as required by MCR 1.109(D)(9)(d) shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history, including when transferred to the Archives of Michigan pursuant to law.

(b) [Unchanged.]

(2)-(4) [Unchanged.]

(E)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk shall not permit any case record to be taken from the court without the order of the court. A court may provide access to the public case history information through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039.~~; however,~~ If a request is made for a public record that is maintained electronically, the court is required to provide a means for access to that record

~~other public information in its case files may be provided through electronic means only upon request;~~ however, the documents cannot be provided through a publicly accessible website if protected personal identifying information has not been redacted from those documents. The court may provide access to any case record that is not available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(D), in a medium for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1)-(2) [Unchanged.]

(I)-(L) [Unchanged.]

Staff Comment: The amendments make certain personal identifying information nonpublic and clarify the process regarding redaction.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 22, 2019, effective September 1, 2019 (File No. 2018-06)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.111 and 8.127 of the Michigan Court Rules are adopted, effective September 1, 2019.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.111. FOREIGN LANGUAGE INTERPRETERS.

(A) Definitions. When used in this rule, the following words and phrases have the following definitions:

(1)-(5) [Unchanged.]

(6) "Qualified foreign language interpreter" means:

(a) A person who provides interpretation services, provided that the person has:

(i) [Unchanged.]

(ii) passed the consecutive portion of a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator (if testing exists for the language), and is actively engaged in becoming certified; and

(ii)-(iii) [Renumbered (iii)-(iv) but otherwise unchanged.]

(b)-(c) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 8.127. FOREIGN LANGUAGE BOARD OF REVIEW AND REGULATION OF FOREIGN LANGUAGE INTERPRETERS.

(A)-(B) [Unchanged.]

(C) Interpreter Registration

(1) Interpreters who meet the requirements of MCR 1.111(A)(4) and MCR 1.111(A)(6)(a) and (b) must register with the State Court Administrative Office and renew their registration before October 1 of each year in order to maintain their status. The fee for registration is $60. The fee for renewal is $30. The renewal application shall include a statement showing that the

applicant has used interpreting skills during the 12 months preceding registration. Effective 2019, rRenewal applications must be filed or postmarked on or before September 130. Any application filed or postmarked after that date must be accompanied by a late fee of $100. Any late registration made after December 31 or any application that does not demonstrate efforts to maintain proficiency shall require board approval.

(2) [Unchanged.]

(D) [Unchanged.]

Staff Comment: The amendments of MCR 1.111 and 8.127 require additional testing for qualified interpreters and include a minor revision in the timing for recertification applications. The amendments, proposed by the Foreign Language Board of Review, promote greater confidence that a qualified foreign language interpreter is proficient in the language and reduce the possibility that renewals are delayed.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

ROBERT P. YOUNG

PRESENTATION OF THE PORTRAIT OF THE HONORABLE ROBERT P. YOUNG, JR.

NOVEMBER 28, 2018

COURT CRIER JEFF MILLS: Hear ye, hear ye—the chief justice and justices of the Supreme Court of Michigan. All persons having business before this honorable Court are admonished to draw nigh and give your attention, for the Court is now sitting in a special session. God save the United States, the state of Michigan, and this Honorable Court.

CHIEF JUSTICE STEPHEN J. MARKMAN: Good evening, everyone, and thank you all for joining us this evening in special, special session of the Michigan Supreme Court for the presentation of the portrait of our former Justice and Chief Justice and colleague ROBERT YOUNG.

This is one of those very occasional moments at which this Court pauses to reflect upon and to preserve its history. Assisting us in that effort, of course, is the Michigan Supreme Court Historical Society, under the leadership now of Carl Herstein, which not only has sponsored this evening's ceremony but has done so many things over the past three decades to maintain the institutional memory of this Court. Just outside the courtroom, for example, in our rotunda, you might notice that there is an assemblage of portraits that reflect justices associated with a number of historical

firsts of the Michigan Supreme Court, and we're proud of that mini portrait gallery that we have out there.

In advance of our main affair, let me please introduce just a few persons who have graced us with their presence this evening. We have the former three-term Governor of the state of Michigan, John Engler. We have two former Justices and Chief Justices of this Court, CLIFFORD TAYLOR and MAURA CORRIGAN. We have another former Justice of this Court, and now a Judge on the United States Court of Appeals for the Sixth Circuit, Joan Larsen—hi, Joan. We have a number of members of the Michigan Court of Appeals: Chief [Judge] CHRIS MURRAY, MIKE RIORDAN, JOHN TUKEL, and MICHAEL GADOLA. We have Ingham County District Court Judge Donald Allen and former Kent County Circuit Judge and now Director of the Office of Veterans Affairs, Jim Redford. We have, somewhere, the United States Attorney for the Eastern District of Michigan and a former General Counsel of this Court, Matt Schneider—Matt. And we have members of the Supreme Court Historical Society, including the former chief of the board, Charley Rutherford, as well as Oakland County Circuit Judge Denise Langford Morris, and former presidents of the Michigan Bar Association and members of the Board of Directors: Bruce Courtade, Larry Nolan, Lori Buiteweg. And also we have our Executive Director of this society, Carrie Sampson. We also have my personal guest, somewhere here, Sam Knecht, who is Professor of Art at Hillsdale College and portraitist for the late Justice THOMAS GILES KAVANAGH, who served on this Court from 1977 to 1983. And, of course, I must take note that we have BOB YOUNG himself here this evening along [laughter]—just so there are no mess-ups here—and his wife, Linda, and his two sons, Robert and Barrett.

Finally, let me say that having participated with Justice and Chief Justice YOUNG in nearly 900 opinions of this Court, I really don't need a portrait to remind me of what he looks like. [Laughter.] At least what he looks like on a very good day. [Laughter.] But this portrait, in truth, will assist the people of this state, as long as this remarkable Hall of Justice stands, that BOB YOUNG was one of the great jurists of this state and that any serious assessment of the 119 opinions he authored, and the 64 other opinions in which he wrote separately, such an assessment can only conclude that these offer an education in the development of the law in Michigan, during one very significant generation of this Court.

I'll now turn over the moderation of tonight's portrait ceremony to my colleague Justice BRIAN ZAHRA.

JUSTICE ZAHRA: Thank you, Chief Justice MARKMAN. I am certainly honored to serve as emcee as we honor my dear friend of more than 30 years, ROBERT P. YOUNG, JR. Tonight, we honor Bob for his service to the people of Michigan, in particular, his service to the third branch of government, the foundation of which is marked by his unyielding commitment to the rule of law.

Before I say some *carefully* chosen words about Bob [laughter], I do want to commend our chief justice, STEPHEN MARKMAN, for his stewardship of the Court over the past two years. Steve succeeded Bob. And we really didn't know what to expect. But Steve has very ably steered the Court with exemplary leadership as we wrestle with many controversial and difficult questions. Let's give Chief Justice MARKMAN a round of applause. [Applause.]

And tonight is not just about Robert, it's also a tribute to his family. Robert would not have accomplished as much as he did without the love and support

of his family. His bride, Linda, and his two sons, Barrett and Robert the III, are the foundation of Bob's being. Without question, Bob wears the pants in this relationship.

JUSTICE YOUNG: Come on.

JUSTICE ZAHRA: But equally clear is the fact that Linda tells Bob which pair of pants to wear [laughter], and Barrett and Rob are quick to inform their father whenever he soils them. [Laughter.]

In all seriousness, thank you Linda, Barrett, and Robert for enduring the stress of public life and sharing your father and husband with all of us who have worked with him here at the Michigan Supreme Court. The people of Michigan greatly appreciate your sacrifice.

Now, to the case at hand. First, thank you to all of the donors who made this event possible and all the members of our staff who contributed to this event—particularly Lynn Seaks—Lynn, where are you? Lynn? [Applause.] Thank you so much for organizing another successful get-together here at the Hall of Justice.

Thanks, also, to the Supreme Court—the Michigan Supreme Court Historical Society and its board members for all they do to preserve not only the portraits of past members of the Court, but preserving the rich history of our Court. We greatly appreciate all that you do.

Next, in keeping with the holiday season that commenced with Thanksgiving, I want to give thanks. I want to give thanks that there is only one ROBERT P. YOUNG, JR., and I don't mean anything derogatory by this. Bob has the ability to inspire those around him to be their very best. Bob can do this by challenging us with his thoughtful, provoking words. Sometimes he

does it with his righteous indignation, and still other times, he does it with kind and inspiring and thoughtful words. He always seems to know exactly what to say and when to say it. Bob is so good at this, he always manages to extract at least 110 percent of the people with whom he works. And as such, no person could survive a clone of Robert in their professional world. So I do give thanks that when God made ROBERT P. YOUNG, he broke the mold.

Like everyone here, I'm looking forward with much anticipation to see what this portrait looks like. I'm sure the painting will bear some resemblance to Robert. It should be no surprise to anyone that when artists are commissioned to do these things, they are often asked to make their subject appear more flattering than real life. Dare I say it? Artists are needed to take this task on so that they can apply their creative talent and paint a much younger and vibrant version of the justice.

Not surprisingly, Bob imposed such a demand on the artist commissioned to paint his portrait. And truth be told, it took several attempts before a realistic version of Bob's portrait was produced. And while I do not know what the final product looks like, through the dark web, I managed to get my hands on one of the rejected efforts. I know it's hard to see, but here it is. [Laughter.]

JUSTICE YOUNG: I'm a show and tell?

JUSTICE ZAHRA: I'm told this looks more like Robert on his wedding day than on his retirement day, and that's why they did not proceed with this one.

But this print made me recall a different portrait that hung on the wall of Bob's office here at the Hall of Justice. Indeed, it was a perfect likeness of our then chief justice. And in my humble opinion, it could have

been donated to the historical society as Robert's official portrait. This likeness of our former chief justice is a tapestry, woven by expert craftsmen from West Asia. Apparently, Bob greeted and entertained a delegation of foreign judges. Their interaction with Bob made quite the impression, although I'm not sure whether they were all positive impressions. While the tapestry depicts a striking likeness of Bob, they apparently also gave him a nickname that they inscribed at the bottom—please, take a look. [Laughter.]

Of course, on occasions such as this, we think about the pantheon of Michigan's Supreme Court justices of the past. The touchstone is the big four: BENJAMIN GRAVES, JAMES CAMPBELL, ISAAC CHRISTIANCY, and THOMAS COOLEY. And I think the best comparison to Bob is Justice BENJAMIN GRAVES, the first of the big four to serve on the Court. Why BENJAMIN GRAVES, you may ask? Because while he was whip-smart and intellectually brilliant, it was his aversion to manual labor that caused him to turn to the law as a profession. [Laughter.] I mean—really. Can you picture Bob with a shovel, or a drill, or a hammer? He did have a gavel available in a conference room, but he never used it. Instead, he had two demonstrative aids at his disposal that he would use any time someone expressed a view with which Bob disagreed. One was a little red button the size of a hockey puck. Staples Office Supply made similar buttons part of their marketing campaign. My kids loved them. You'd push the button and you'd hear, "That was easy." But when Bob pressed his red button, the word came out, "Bullshit." [Laughter.]

Bob's other demonstrative aid was a can of Shinola shoe polish. And when Bob picked up this can, he didn't have to say a word. But he made it clear to you that he

thought whoever was speaking was polishing a turd, and those are his words, not mine. [Laughter.]

But seriously, Bob's tenure on the Court and particular his tenure as chief justice, was one of great change and reform in Michigan's judiciary. Under Bob's leadership, the Michigan court system became more efficient and more effective. Michigan's judicial branch of government became better stewards of the public resources given to us. Bob insisted that judges and courts listen to the public and respond to their concerns about court operations. There is no doubt that Bob's legacy as a justice, as a chief justice, and administrator will live on for many, many decades.

And Bob's administrative skills ought not be overshadowed for his opinions. He wrote dozens of opinions that will impact Michigan law for years to come. Among his finest, and one of my favorite, is *Wayne County v Hathcock*,[1] an eminent-domain case in which Bob wrote a unanimous opinion, in which the Court held that when the Michigan Constitution uses the word "public use," that's exactly what it means; the government can take your property for a public use, not for any public benefit.

And in *In re Advisory Opinion of the 2005 Public Act 71*,[2] Bob, writing for the Court, held constitutional a law that required voters to provide state official identification, a driver's license, some official ID, or other generally recognized picture in order to vote. These are wonderful opinions, but they're just two of the many, many great opinions that have impacted Michigan law, written by retired Chief Justice BOB YOUNG.

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[1] *Wayne Co v Hathcock*, 471 Mich 445 (2004).

[2] *In re Request for Advisory Opinion Regarding the Constitutionality of 2005 PA 71*, 479 Mich 1 (2007).

But enough about Bob from me. Let's turn to our impressive list of speakers. First up is retired Chief Justice MAURA CORRIGAN. Just this past Monday, Maura was here in the courtroom. She was not arguing for a client, she was not giving a tour to her delightful and beautiful granddaughter, and she was not swearing in a new attorney as she often does. Maura was not receiving an award, though she has received many, both for her service to our justice system and her efforts to help Michigan's children. Maura was here on Monday to present the first Maura D. Corrigan Foster Family Lifetime Achievement Award to a great-great-grandmother, who fostered 38 children after raising five children of her own. I mention this award to emphasize a simple truth. Maura is a public servant, who has dedicated her life to helping others, especially Michigan's children. Her work to improve child welfare in Michigan is truly remarkable. Equally impressive is Maura's commitment to the separation of powers, the rule of law, and the proper administration of our courts. I truly believe Maura's leadership inspired Bob, as she was an outstanding chief judge at the Michigan Court of Appeals and an exemplary leader as chief justice of our Michigan Supreme Court. Among her many notable opinions is *Glass versus Goeckel*,[3] the case that gives people the right to walk across the beachfront of Michigan's Great Lakes. I know Robert dissented in that case; I still think it's a great opinion. [Laughter.] Please welcome retired Chief Justice MAURA CORRIGAN.

JUSTICE MAURA CORRIGAN: Thank you. Are you ready?

JUSTICE YOUNG: Give me your best.

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[3] *Glass v Goeckel*, 473 Mich 667 (2005).

JUSTICE CORRIGAN: And may it please the Court, Chief Justice MARKMAN, Justices, family and friends of ROBERT PRESTON YOUNG, good evening. Thank you to the Court and to the historical society for hosting us. Tonight we celebrate ROBERT YOUNG, our colleague and our friend, as his portrait is formally presented to this Court.

I want to begin with a wonderful German word that I just heard, and apologies to the German speakers in the room while I torture the pronunciation. The word is "torschlusspanik," and it means the fear of time running out. Now, I admit that I have this fear especially now in my seventh decade of life because the time to say what really matters seems short. So here's what matters about ROBERT PRESTON YOUNG: he was an outstanding justice who served the people of Michigan with distinction, and that will be the verdict of history.

Bob and I worked together as judges for 15 years; first, on our state Court of Appeals, and then, on the Supreme Court. We loved the work, we loved deciding the cases and tackling the issues of court administration. And when we got there, back in the early 90s, we'll all remember that the Court of Appeals was horribly backlogged. It was plagued with long delays before any civil-case oral arguments were even heard. And every year we had a staggering number—thousands upon thousands of guilty-plea appeals by right.

Through a series of court-rule reforms, and new internal operating procedures, and a constitutional amendment that made guilty-plea appeals discretionary, the Court of Appeals became timely. And then Judges TAYLOR, and Justice—then Judge—MARKMAN, BOB YOUNG, and myself, many of our other Court of Appeals colleagues led by then Chief Judge MARTY

DOCTOROFF, worked to make this happen. Together, we thought about reforms and how to get those done. And Bob was a pivotal player in those reforms.

I think his interest in court administration began then and persisted when he was on the state Supreme Court. And Justice ZAHRA has already mentioned his leadership as chief justice here, marked by technology advances, by judicial performance measures, and most certainly by improvement in the relationships of the justices of the Court. But make no mistake about it—and I'm concurring with BRIAN ZAHRA, right now—it was Bob's work in deciding the cases that made him an outstanding judge.

While preparing for these remarks tonight, I thought about what it is that makes a good judge. And I settled on three characteristics: a good judge is independent, a good judge is principled, and a good judge is diligent. Well, ROBERT YOUNG is independent. Fiercely so. What does that mean to be an independent judge? Perhaps some of you are familiar with the remarks of Chief Justice John Roberts last week. He talked about judicial independence, and I quote him directly:

> We don't have Obama judges or Trump judges, Bush judges, or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.

And so, too, in Michigan we are not Snyder judges, nor are we soon-to-be Whitmer judges, nor Engler judges, nor Granholm judges. And while many persons present in this room were blessed to be appointed by governors and appreciate so much the governors' confidence and faith in us, the opinions that we render are our own. They are our own work. Donning a judicial

robe means that the law itself is your client, and ROBERT YOUNG, of anyone, understands this. That's what makes him independent.

Bob learned independence at home from his parents. His father, a physician, Dr. Robert Young, and his mother, Robbie Jo, a florist. I can testify that his mother was a force of nature. When I met her, she was my mother; I had a mother who was a force of nature always. And Dr. and Mrs. Young were trailblazers. They broke color barriers, as did their children. Most of all, I think, they valued education, and they taught Robert to strive to be the best and to never give up. And I think his subsequent scholarship and his great judgment clearly reflect the solid foundation given to him at home and the abiding influence of his parents and family.

So, second, a great judge is highly principled. Robert is and was, as my colleagues Justice ZAHRA and Justice MARKMAN have already pointed out, Bob was one of the architects of a method of interpretation called textualism. And this was, of course, the approach advanced by Justice Antonin Scalia. Now a textualist does not pick winners and losers. A textualist does not make it up as they go along. Instead, the judge ascertains the real meaning of the words that the lawmakers actually use. And this honors the separation of powers. And I am going to eliminate the next section of my remarks—

JUSTICE YOUNG: Thank you. [Laughter.]

JUSTICE CORRIGAN: You're welcome. As I didn't coordinate with BRIAN ZAHRA, but we both selected *Wayne County versus Hathcock* to talk about. That was an important opinion and decision of ROBERT YOUNG. But as has already been pointed out, he's been a principled decision-maker across thousands of cases.

And finally, a great judge is diligent. Robert came exquisitely well prepared to court conferences and to oral arguments; he had studied and done the surgery in his office and at home, so he was always ready to go for the jugular. I can hear him now, as I heard him over many years, at oral argument, "Counsel"—long pause —"Counsel?" And then would begin sometimes a tedious and pedantic [laughter], sometimes a torrent of questions for the unwitting, perhaps unprepared. Now, some lawyers did very well with this. But some, and everyone on this bench can attest to it, there would be the person standing there at that podium. And first, they would have a deer-in-the-headlights look. Some days, it would be as if, when that lawyer was being questioned, "May that floor open and may it swallow me up, God, right now"; that was the reaction that ROBERT PRESTON YOUNG could evoke in lawyers. Now I played around with this phrase for a long time and here is what I have settled on. Despite Bob's penchant for such forays, I red-inked "evisceration," I red-inked "flayings," so the actual final language is "the forays" for such episodes with the lawyers. I did come, finally, to understand that such questions really did help us to identify the governing principle in the case. And so this is why I think that Robert has been an outstanding judge. Because he is independent, he's principled, and he's diligent.

ROBERT YOUNG has also been and is a good man; he's a caring and compassionate friend. During my late husband Joe Grano's very long illness, Bob consistently supported me. He wasn't afraid to ask the hard and painful questions and to put his arm around me. It is true that Robert and his sidekick, CLIFFORD TAYLOR, are irrepressible teases. And I, to this day, resent the nicknames that they gave me. Including, "the Hurri-

cane," "Winston Churchill," and my most favorite of all, "Mother Superior." [Laughter.]

JUSTICE YOUNG: There are others. [Laughter.]

JUSTICE CORRIGAN: But when I broke the news to Bob that I was going to leave the Supreme Court, to join the Snyder administration, he cried. Bob has been richly blessed in this life. His wife, Dr. Linda Hotchkiss, has been his fulcrum and his anchor since they were sweethearts in college, I think well-more than 40 years ago.

JUSTICE YOUNG: Yup.

JUSTICE CORRIGAN: And Bob calls his sons, Robert and Barrett, his greatest legacy. And I agree with observations like that because of how important children are. But ROBERT YOUNG's legacy is also here in this Hall of Justice. This is where Robert the genius, Robert the master of language, and the wizard of words, protected our Constitution and our freedoms for 22 years. ROBERT YOUNG was faithful to his oath. He did his level best, and that level best was extraordinary. So on behalf of the people of Michigan, ROBERT YOUNG, I thank you. Thank you for your service. Thank you for your leadership. And may God always bless and keep you, ROBERT PRESTON YOUNG. [Applause.]

JUSTICE YOUNG: Keep it short.

JUSTICE ZAHRA: Our next speaker has an amazing legacy as state Senate majority leader, as governor, and now as president of Michigan State University. What is sometimes missed in the recitation of Governor Engler's accomplishments as a tax cutter, job creator, and government reformer is how he reshaped Michigan's judiciary through the appointment process. While the credit for his judicial reform most certainly must go to the Governor, his great success was made

possible by the diligence and meticulous vetting by his chief legal counsel, Lucille Taylor, who I believe is here today, and the deputy counsel, Judge MICHAEL GADOLA, now in the Court of Appeals. Thank you both for all the work you did for the Governor.

Just look at his appointments to the Supreme Court. Who could ever forget the commercial, "Markman, Taylor, and Young. Oh, my." [Laughter.] And then Governor Engler worked exceedingly hard to make sure his appointee to the Michigan Court of Appeals, then Judge MAURA CORRIGAN, was elected to the Supreme Court in 1998. I was very happy for Michigan, and a few days later, I was very happy for me because the Governor appointed me to fill Maura's seat. [Laughter.] As Governor, John Engler did for Michigan what President Reagan did for our nation. He took a government that was desperately in need of leadership and in grave economic despair, and he returned it to pride and prosperity.

But John Engler did something for Michigan that President Reagan only dreamed of doing for our nation. He transformed the judicial branch. When Governor Engler was ready to leave office, the Wall Street Journal observed that the Michigan Supreme Court "may be the finest in the Nation."

Beyond appointments, of course, Governor Engler had the foresight and the vision to make real what had been promised for generations: a home for the Supreme Court, the Court of Appeals, and the State Court Administrative Office. This building that we are in, the Hall of Justice, is a testament to John Engler's leadership and his ability to forge coalitions and get things done for the good of the people. Please help me in welcoming former Governor and now Michigan State University President, John Engler. [Applause.]

GOVERNOR ENGLER: May it please the Court, Chief Justice and Justices, and the distinguished assemblage that is here tonight to honor ROBERT YOUNG and his legacy of service to the state of Michigan.

I leaned over to Cliff, just after Maura finished—I said, "Cliff, you want to go next?" [Laughter.] I mean, really, this is impossible. Maura, that was a wonderful tribute to Bob. And I think, you know, Bob was wanting humor tonight. He wanted everyone to, you know, kind of come here with a repertoire of jokes. But the judiciary is a serious place. And Bob, despite that great sense of humor, as Maura so eloquently testified today, was a justice who was consequential in Michigan's history, and his presence on this Court, the Court that he was part of, has done so much and has meant so much to this state. And I thought about—I actually called Lucille today, and I said: "You know, this is impossible; I'm sort of wedged between Maura and Clifford. What in the world am I supposed to contribute to this?" And these are two Justices who served alongside Bob for so many years, first at the Court of Appeals and then the Supreme Court.

It was my privilege, and it is every governor's privilege, as Governor-elect Whitmer will soon find out, when there's an opportunity to make an appointment to the judiciary, to look at the individuals and to try to assess their judicial potential, and that is more critical as the judicial post maybe moves up through the judiciary. I think we have in the state today—I'm told something like 243 separate courts and we've got about 165 sort of funding units that are out there. But the seven members of the Supreme Court sit astride that and the third branch of government. And it is a separate branch, and it's a judicial branch; it's got its own article in the Constitution. And I was privileged to

serve in the other two branches. So I—through my appointments—I guess I could dabble in the third one, you know. But I never had the privilege of being here, just like I never had the privilege of being a university president. [Laughter.] And so an honor which I, in both cases, would have perhaps been willing to forgo. [Laughter.] Now I'm aged-out, so I'm—impossible that I would be part of the judiciary.

But I did think about what are the things—and this is what Lucille and I talked about—what matters when it comes to appointing judges. And I have believed and spent many years in the legislative branches. Justice ZAHRA was kind to note in his introduction, some 20 years in the Legislature, a tenure which, due to term limits, is impossible any longer. But starting out with years in the minority in the House, where we dissented in the minority and then into the majority and eventually leading that majority. And along the way, saw many things and experienced many things. One of those experiences centered around the idea that the legislative branch, in doing its legislating, was attempting to write laws to address problems in society, to change the way work was done, or to change the rules under which work would be done. And when we would work hard and get a compromise at times, much of that time was spent in a divided Legislature. So you had to work across the aisle. And even if the Legislature was united, then perhaps the governor was with the other parties. You had always to work through compromise. But that compromise was hard-fought often, and it was the thing of campaigns, and campaign promises, and campaign controversies. But when people got sworn in, they had a job to do. And when they did that job, obviously, there would be sometimes—maybe frequently—someone would be unhappy. And so, where did they go? If they couldn't

persuade the governor to use his executive power to veto the legislative action, they seemed inevitably to head to the courts.

And I guess that formed part of what I thought about when it came to looking at who would be suitable and who would be most important to seek out. And these would be, I think, individuals who would certainly be, I think, somewhat predictable. But I started with the first principle of understanding separation of powers: that there are these three branches and that each of them have their own responsibilities. And that if we write something down—if it's written in the Constitution, which has been cited twice by Justice ZAHRA and by Justice CORRIGAN in terms of one of Robert's cases relative to the takings—there's also a lot of other things that are in that Constitution that seem to be pretty clear. We actually found some things that were in the Constitution hadn't really been applied before. Lucille's great work as a student of the law and constitutional scholar, and some good advice from a lot of others, we realized the authority of a governor to reorganize the government was there. And Michigan has this kind of unique and young Constitution, only having it written in '61 and '62.

Interestingly one of the things, you know, these things come around, but Bob and I are at the campus, and we walk over to the International Center—and today, there's the room where the old Con-Con furniture is in. And most of the students on the campus don't even know what Con-Con refers to. But it does refer to the constitutional convention, and that's where George Romney first, you know, came to power. And his Citizens for Michigan was one of the moving forces behind that. And John Hannah, the former president of Michigan State, was a member because nonpartisan

folks served in that Con-Con. The president of the convention—the constitutional convention, was a member of the Michigan State Board of Trustees, Steve Nisbet. We actually put the sign back up in the room. They used to—it was called the Con-Con room at one time, and that sign disappeared; well we put that back up with an explanation that everything in the room actually was salvaged from the constitutional convention, which was held over here in the old Civic Center. It's not over there, but down that-a-way now. But that's all gone. But we did, while we had the opportunity to build a new building, named it Constitution Hall in respect for—really, the Constitution that got written in that building. But the importance of that Constitution in '61–'62, it was a modern constitution. It got approved—talk about a close election—I think my memory is that probably under 1,500 votes was the margin in approving that. We've got the historical society here. Peter Ellsworth would probably know the exact number; he may have handled the recount, I'm not sure. [Laughter.] You know, but [inaudible] been around awhile.

But nonetheless, in that Constitution it had the executive article, legislative article, and judicial article. And I thought all these judges ought to be aware that there were these different articles, and these different responsibilities, and that interpreting the law as written—or the Constitution as written—was a good start in terms of a judicial philosophy. And the same one for statutes that if it said "no," it ought to be "no"; if it said "the," maybe that ought to mean "the"; if it said "a," that was different than "the." And you know, there's some things like that.

And I know this Court has struggled with these questions, but Robert helped to bring clarity on some of

these matters. But—so I looked for judicial appointments that brought this sense of awareness of the Constitution and fidelity to it. And who would understand the importance of bringing clarity to the law, predictability, stability. Those were three of the things that Lucille and I were talking about earlier today.

And clarity—I mean, we—people need to know what the law is. And because this Court has done, in recent years, a very commendable job, we've seen the number of appeals being filed dropping dramatically. It was not just eliminating that—that appeal by right of these guilty pleas; it was also clarity in the law so that if you could—as a lawyer practicing somewhere in Michigan read something, you realize that if it said "no," this Court was going to say it means "no." And we used to be a little bit critical saying that the old days—kind of like get a lottery ticket; it may say "no," but if you can persuade it means "yes," hey you get lucky today. And so we wanted that.

Predictability is the same thing. I mean, kind of the idea that if the process was going to work, it was going to work the same for everyone, and it was going to work regardless of who you were. And stability. Sort of all of these kind of come together to create—and then, as Maura pointed out, independent, principled, diligent. I mean independent in the sense that you have to be able to, you know, resist, you know, take the jersey's off. We urge our trustees to do that—Michigan State, they are not wearing a donkey or an elephant, they're—we want to put the green and white on, and we like that in the judiciary. Put the black robe on; take the party labels off.

So I think BOB YOUNG in—when it was time to look at somebody—and I had to persuade him to give up the private sector. And why would Bob want to be rich,

anyway? I mean, he's rich with friends. [Laughter.] You know, he had Cliff, he had Maura, and he had me. And by the way, Michelle very much extends her regrets tonight. She's in Texas with her dad, who is not in good health, and so she could not be here but very much wanted to be here.

I think Bob, in going on the Court and then having the opportunity—then elevate him to the Supreme Court, became the kind of justice that makes all of us very proud. And I think the point that has been made about his portrait being here and his own service being an exemplar of service as a judicial, rule-of-law judge, who really did follow the Constitution, follow the statutes, and enforce the contracts, you know. But this is the kind of judicial leadership, the kind of integrity, that is so significant.

And now I can tell you that, you know, we didn't—even though he's left the Court, his talents were simply too extraordinary to be left just to any old client, so we wanted to get him a client. And this is hard to get him to take the Harvard colors off, put the green and white on. I mean, we're even working on Bob becoming a sports fan which is really odd. [Laughter.] That's almost as strange as Justice ZAHRA seeing him with a shovel or something. You know, Bob cheering for a team.

JUSTICE ZAHRA: I noticed he wasn't at the tailgate. [Laughter.]

GOVERNOR ENGLER: You know, he did understand offense, because generally he's been on offense most of his life. [Laughter.] But defense—he didn't play defense so well. And we've had to play a fair bit of that, too. But he has done the extraordinary job as general counsel. His vote to become general counsel was somewhat less unanimous than it was here at the Supreme

Court when he became chief justice, I suspect. But, nonetheless, we have him in place. And the university and the 500,000 members of Spartan Nation are very, very proud. In fact, he has done so well that we received a call—this is going to shock you—on Monday from Ann Arbor. They were looking for legal help. There's a certain very expensive contract down there. They were wondering if they could maybe break that contract. [Laughter.] And I said, no—no, he's not going to—he's not getting involved in this at all. I mean, it's a—they were so hopeful, weren't they? So hopeful. So sad. Anyway.

The work that Bob is doing now at Michigan State is—it's a marvel to behold, and I get the privilege of working with him every day, and it is a delight. But it is built on a foundation of service to the people of this state. And he's for sure doing public service again—pays just a little bit more than being on the bench, but the impact that he will have at Michigan State, as significant as it's been already and as it will continue to be in the coming years, literally pales in comparison to the impact he's had for the state of Michigan and the Court that he served on, the impact that they've had on state courts across the nation.

And so it was a privilege to be able to ask Bob to serve, and it was a great delight to watch him as he served the people of Michigan, as he explained judicial philosophy, as he explained rule of law. And I'm just honored to be asked to be part of this tonight. And it is impossible to follow Maura. Thank goodness, I'm preceding Cliff and I can get off the stage.

But Bob, I do want to say to you and to Linda, your family—and we know Bob recently lost his mom. She would have loved to have been here to be part of this celebration, but she too—we all have the images of Bob

that are forever with us that we actually don't need the picture and—actually carpet though—that or the—that—that one is up here, too, so—but I just, again, to the Court, thank you for honoring the Justice and honoring us with your attendance here tonight, and your presence. And to the historical society, thank you for what you've done. Not just in keeping Bob and these current justices, but what you have done in terms of bringing back the history of the whole Court.

Last night I was at Michigan State, and Governor Blanchard had a program. And Cokie Roberts was there. And one of the things she pointed out that he, Governor Blanchard, and her both serve on the Board of the National Archives, and she said one of her missions in life is to bring back civic education. And again, this Court deserves a great deal of credit for that learning center that is right downstairs, and the contribution that makes, because that's a mandatory stop for anybody that comes to Lansing on a tour today. And heaven knows, civic education is desperately needed. And that does include some judicial education and understanding of what Bob seemingly has known for all of his life: that there are three branches, they each have their own duties, and we're all better off if they don't meddle in each other's affairs. So Bob, congratulations on a stellar career, on this very fitting tribute tonight; it's an honor to be part of this, and congratulations. [Applause.]

JUSTICE ZAHRA: When Robert joined the Supreme Court in 1999, I had known him as a blunt, boisterous, fun, opinionated person who would let you know exactly where you stood even if you didn't ask for his views. That was not a problem when he was on the Court of Appeals. After all, you enjoy complete anonymity on that Court—ask MIKE GADOLA. [Laughter.] I

was, however, a bit concerned when Bob—how Bob would present himself as a Michigan Supreme Court justice. But Bob quickly showed he was very judicious. His public remarks were thoughtful and professional, and he was nicely filling the public persona of justice of the Michigan Supreme Court. I was so happy and proud for him.

I also attempted to compliment then Chief Justice CLIFFORD TAYLOR on materially assisting Bob in forming his judicious public persona. And without missing a beat, Cliff said to me: "Brian, Bob hasn't changed one bit. True enough, he's been spending a lot of time with me, but nobody hears the man banging the cowbell when he's standing next to the guy yelling with the bullhorn." And Cliff, most certainly, was the guy with the bullhorn. Those of us who have spent any time with BOB YOUNG and CLIFF TAYLOR know that laughter will fill the air when they're together. Bob and Cliff share one important quality: they each think they are very, very funny. [Laughter.] And truth be told, both of them are very, very funny. Whenever Bob and Cliff are together, laughter just cascades through the room.

On a serious note, Cliff was the first of the foursome of MARKMAN, TAYLOR, YOUNG, and CORRIGAN to join the Michigan Supreme Court. Initially, he made his presence known through thoughtful and measured dissents. He eventually garnered the votes to write majority opinions, and he had a great impact in all areas of Michigan law, particularly, in the area of statutory construction and contract interpretation. Among his many great opinions are *Wilkie versus Auto-Owners*,[4] a case that quite commonsensically held that an insured who does not read his insurance policy cannot

[4] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003).

reasonably expect coverage not expressly provided in that policy, and *Rowland versus Washtenaw County Road Commission*,[5] in which the Court held another remarkable proposition—that a statute requiring a party to give notice to the state of injuries within 120 days of sustaining those injuries in order to avoid a governmental immunity must actually give such notice within the 120 days. They sound simple and commonsensical now, but they were difficult cases to decide at the time. I'm sure Cliff has some very funny stories to share with us, and I can't wait to hear them. Please, help me welcome retired former Chief Justice CLIFFORD TAYLOR. [Applause.]

JUSTICE TAYLOR: It's really nice to be batting Republican clean-up tonight. Incidentally, if you wonder if your child is going to grow up to be a Republican, you'll notice early on they start carrying blue boxes around.

I'm flattered to have been asked to give my thoughts on this occasion where we are honoring the service of Justice ROBERT P. YOUNG, JR., as his portrait is unveiled. His portraitist is the same as mine. She one time told me this really glorious thing. She said, "You know what the three worst words in a portraitist's life are?" And I said, "No." And she said, "When you unveil it, the honoree says, who is that?" [Laughter.]

I'm happy to speak here tonight because I believe he easily ranks as one of this Court's great judges. I suppose I was natural for this as we served together, not only on this Court but also on the Court of Appeals for many years. And before that we had served on the State Bar Committee on Character and Fitness as well as the State Board of Law Examiners. When I joined the character and fitness committee, Bob was already

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[5] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007).

on it, serving as chairman. I was immediately impressed with his abilities and remarkable capacity to deliver quite well-constructed, eloquent even, extemporaneous opinions for the committee, following a three or four-hour hearing on whether to approve for admission to the Bar, applicants who, while having completed law school and the Bar [examination], had had some misadventure in life such as drug use or the like that threw their character to undertake the practice of law into question. Bob would come up with just the right theme to his remarks, as he sermonized to the wildly apprehensive applicant, as to what his duties to his clients and the community at large would be once a lawyer. They were also sensitive, and I think altered the young applicant's approaches to the law, and perhaps even to life. There was also one other aspect of these remarks, worth commenting upon, as it was a trademark of his work later as well. And that was his propensity to dip into the bowels of the English language at the crucial point, to come up with just the right words, which usually had been last used in the mid-sixteenth century or earlier. [Laughter.] Yet so clear, however, was the trajectory of his remarks that a little bit of language fog did no harm. Needless to say, such a budding pedant was immediately attractive to me; I like arcane words, too, but I try to go no further back than to use gems from the nineteenth century. Of course, as I mentioned, service together in the appellate judiciary of this state came later, and with it many re-election campaigns where we went on to confuse lots of meetings with just these approaches to public speaking. Mercifully, Justice STEVE MARKMAN, who was with us on the stump for two elections, usually restored order with a plain-spoken, quite-sophisticated analysis and thereby saved the day. In any case, I digress. But when I heard, for the first time, Bob turn on the

smoke-machine homily, little did I know that this was a talent I was going to get lots of opportunities to observe.

Should you wonder if Justice YOUNG ever mastered the common touch, my suggestion is that to answer that you go to read the first sentence of the much-referred-to *Wayne County versus Hathcock*. I won't ruin it for you, but it contains a relic of the sixteenth century, I believe might well have been used last by the philosopher David Hume or John Locke. [Laughter.]

One more story and then on to the serious business of explaining his record. You may recall that Justice YOUNG, awhile back, got the bee in his bonnet to run for the U. S. Senate. When all this went on, Lucille and I were in Florida doing law school teaching for the winter term, endeavoring—or at least I was, to turn innocents into Scalian textualists. So I didn't have the opportunity to bring him the usual cold compresses and a very dry martini that usually brought him back to earth when he had crazy ideas. So by the time we were back from Florida, it was underway. To help, I volunteered to contact his many former clerks to raise money for the campaign. The willingness to help was remarkable; they were so generous and loving towards their old boss. For me, it was gratifying to have my understanding of what a fine person he was validated by those who knew him in a way I never would. These young people came from many political backgrounds but almost universally they were quick to lay their subsequent success largely on his developing their talents in the law and their attitudes on life and its snares. Many of them are here today, and you can chat with them easily as they all share some distinctive ticks and twitches [laughter] that apparently come from an extensive exposure to our honoree.

Speaking of political views, as you know, Bob is a Black conservative. Now, it's not easy to be a Black conservative, but it's even more complicated if you have a very prickly personality with a highly irreverent sense of humor. [Laughter.] I saw a lot of both of these things on the stump with him and have to confess I was absolutely no help in rescuing him, as I was so amused at scenes such as some Northern Michigan insurance salesman mulling on a morsel from Robert, like, "The solution was binary." [Laughter.] Then again, I was there talking about the rule-of-law problems limbed by the execution of Charles the First of England in 1649. So I wasn't improving things; it was really quite a show. Again, STEVE MARKMAN was left to make things right. He always did, and we actually won a couple of elections.

And now, I will be a little bit more serious. Quite simply, I believe BOB YOUNG to have been, as I said at the beginning, one of the great judges in this state's history. He came onto a bench, this one, that had long been, frankly, rather pedestrian. Some fine people had served, of course, but it also looked—it also had, looking back 50 years or so, housed former high-level executive-branch officials with little interest in the law, but lots in making policy. Lawyers who were trade-union favorites, who saw this position rather like an ambassador from an interest block might. And the possessors of Irish surnames with occasionally few other credentials. The bottom line was that much of the Court's work reflected negligible intellectual heft. Treated poorly had been the disciplines that the Anglo-American rule of law requires, such as deferring to the political branch's policy choices, no matter how distasteful, as long as constitutional. Rigorous attention and adherence to the original meaning and context of rules of words and phrases filed in instruments before

the Court, mastery of the impact of grammar and syntax on meaning, and simple honesty in refusing to distort or misread instruments to get results the judge liked better.

From his first day as a judge, he was intolerant of such failures and wrote great opinions returning the law to sound footings. Or, when necessary, reversing those that had gone astray. When he wasn't in the majority, it was because he was uncompromising in his refusal to sign opinions that didn't measure up to his standards, choosing rather to rewrite or failing that, preparing principled dissents which showed true north and blew the whistle on the trimmers and their arguments. These were opinions and dissents that attempted to return this once-great Court to the trajectory set for it by its greatest Justice, THOMAS M. COOLEY, in the early days of statehood.

Bob was joined in this effort, of course, by those who formed the frequent majorities on what I like to call the Engler Court, so great was the Governor's role in putting—not just BOB YOUNG and his ideas on the Court, but also others who shared them: MAURA CORRIGAN, STEVE MARKMAN, and me. Moreover, Governor Engler guided and supported us through vicious election campaigns directed at us by those who sought a return to the days of undisciplined, result-driven jurisprudence.

In all those frays, Justice YOUNG was tireless and, more importantly, fearless in patiently explaining to our citizens and our media that, as he put it, while the Court might have the raw power to go rogue and abandon the rule of law, it never has had nor does it have now that authority under our Constitution. To

have argued for such a thing is quite a legacy, and I am glad to have shared it with this fine man. Thank you. [Applause.]

JUSTICE ZAHRA: Well now we have a very special guest speaker, the better half of the Bob and Bridget show. While many were surprised with the friendship and strong working relationship that emerged in 2013 and beyond, between then Chief Justice YOUNG and newly elected Justice BRIDGET MCCORMACK, I was not. In my 30-plus years as a lawyer, judge, and justice, Bob and Bridget are among the most passionate lawyers I have ever come to know. Indeed, they have their differences. Yet their passion for the law and our system of justice form a strong foundation for a natural friendship. As a result, the Michigan Supreme Court not only was and continued to be an intellectually challenging place to work, it also became a very fun place to work.

Their positive relationship was the key to success of the Court over the four years they worked together. Together they helped the Court be more cohesive, more efficient, and more collaborative. Though, I must report that since Bob's departure, Justice MCCORMACK has had a rare moment or two of impetuous decision-making. [Laughter.] For example, she made a very unfortunate decision recently, in advance of the big game. This past weekend, Bridget made a very public bet with one of her counterparts on the Ohio Supreme Court. I even heard some sources report that, like senior [Michigan] running back Karan Higdon, Bridget guaranteed a Maize and Blue victory over OSU. And we all know how that turned out. Had Bob been around, I'm sure he would have advised Bridget to bet

on Harvard, who beat Yale this weekend, 45 to 27. Friends, please welcome Justice BRIDGET MCCORMACK. [Applause.]

JUSTICE MCCORMACK: I'm pretty sure I am speaking tonight because I insisted, so please don't hold this against Bob. [Laughter.] And I have some prepared remarks, but I want to say at the front end that there are a lot of things I love about Bob, and you're going to hear about them, but perhaps, none more than the way he loves Linda, and Barrett, and Robert. That—whatever you think about him, it will melt away when you see the way he loves them. [Laughter.] And I want to briefly say that Justice BERNSTEIN sends his best; his absence is not protest. In fact, it's the opposite. As Bob and Linda will tell you, he is actually one of—a member of their family. This is true. He goes to their family reunions.

JUSTICE YOUNG: That's right.

JUSTICE MCCORMACK: It's a long story. Ask him about it later. But the photos are fabulous. [Laughter.] I first met Bob in this courtroom. I don't know if he remembers it. I think he pretends to, but I was at the table he is now sitting at. I was an advocate for a prisoner. The Court actually requested my appearance. It was a prisoner who had no lawyer, and I was on the faculty of the University of Michigan. The Court called and asked one of the clinics to represent the unrepresented prisoner, and that fell to me. My students wrote the brief, but the student-practice rule didn't permit them to argue. So I had to argue the case, which I did. And at the end of the argument, Bob complimented me from here—from the bench. I don't remember where he was sitting at that point, but he told me that I did a better job than most lawyers who appeared in the Court. [Laughter.] And, you know, like someone with thinner

skin might have translated that as an insult. But you know, thinking I was only a law student, he thought my argument was pretty good. But since I was, in fact, an experienced appellate lawyer and a member of the University of Michigan law faculty, his assessment was not wholly positive. But I was pushing 40, and being mistaken for a law student sounded pretty good to me. Compliment taken. [Laughter.]

After my election in 2012, Bob's was one of the very first phone calls I received. I don't know if you remember that, either, but it was before 8:00 in the morning; he called to congratulate me and extend his assistance in making my transition. And that warm welcome that morning began a dear friendship. From that day forward, Bob always gave me his focused attention, his thoughtful consideration, his energetic reactions to all of my ideas, good ones and bad ones about cases, administrative projects, and even our own norms and habits.

I keep a lot of data in my own office—all right, Lori keeps the data, everybody knows that, about a lot of things that we do over the course of a term, including of course about our decisions and who decides what cases together, mostly for oral-argument cases. The rest of course—the denials, the abeyances, the remand orders—those are almost always unanimous, not always, but often. But in the cases that go to oral argument, where—those are the cases where you'd expect the most disagreement. Those are the hard cases, hopefully, right? They are the cases that need our Court's attention because they're complicated. Those are the cases where even when I disagree with a colleague I can clearly see their position—his or her position. So for the last full term that Bob served in

those hardest of hard cases, Bob and I agreed 96 percent of the time. And in the other orders—

UNIDENTIFIED ATTENDEE: [Indiscernible.]

JUSTICE MCCORMACK: I know. I'm sorry. Add in those other orders and the number would probably approach somewhere near 99 percent; don't hold it against him. Hell, don't hold it against me; we're judges. It was his job to call it like he saw it, not the way he wanted it to be. That's what Bob did, and he was extremely good at it.

The only reason that might be surprising to some is because there's a tendency for people to view the Court's work through a partisan lens and to focus only on the cases where justices disagreed—and I mean this mostly by the media, not sophisticated people in this room—and to lump disagreements into partisan piles. I worry sometimes that that tendency is increasing lately and appreciated Justice CORRIGAN's comments to that effect.

That view was simply not borne out by the time I served with Bob and Steve and Brian and David and Joan. That view was not borne out by the data. Which isn't to say that we wouldn't disagree in another branch of government, or over a cocktail, we would. We definitely would. But the easy explanation for why we would so often reach the same outcome in the hardest of hard cases is, of course, the rule of law. Bob's decisions were driven by the principles that animate the rule of law: commitment to text, judicial restraint, and separation of powers.

Bob's opinions say things like, and I'm quoting, "Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory text, to discern the legislative intent that may be inferred from

the words expressed in a statute." Or, "when a statute is clear and unambiguous, judicial construction or interpretation is unnecessary and therefore precluded." Bob did not view these principles as important in the abstract; neutral principles applied neutrally are the very foundation of our rules of decision. He cares about the words of the law, the real words on the page.

But decision-making is, or can be, only a part of what the Court does. Because we are also charged with the administration of the courts of the state, a charge that BOB YOUNG woke up and went to bed thinking about when he was the chief justice. And they were long days. From the moment I met BOB YOUNG, he was energetically involved in remaking the branch as one focused on serving the public through this aspect of our work; it doesn't always get the most notice, but it's probably the most important. Bob believed that our administrative operations had far more ability to both help and hurt people than any opinion our Court issued. And if there were things we could be doing to improve the way our Court served the public, he was going to figure out how to do them. So he set out how to figure out how to use technology to make the courts run more efficiently and more effectively for more people; to measure performance of our courts by asking the people who use them (the litigants and the lawyers) how they were treated, how we measured up; and to be good stewards of the taxpayer dollars sent our way by re-engineering how our courts work. He managed with these goals driving all of his decisions, embracing specific initiatives and programs that literally made life better for people across the state. Online dispute resolution allowed people with minor disputes to negotiate and resolve them online without missing a day of work to come to court. Investing in and growing our

treatment courts allowed people struggling with addiction and mental-health issues to connect with services and resources to address the real problems that got them into court. Our limited-English-proficiency rule ensured that non-English speakers could understand what was happening in our courtrooms, and our self-represented litigant website is one of the very best in the country. Fifteen point two million people have visited it since we launched it. And its tool kits are used to generate forms an average of 256 times a day. People across the state who can't afford to miss work, who are struggling with mental-health issues and addiction, who can't understand or speak English, who can't afford lawyers, are better off today in Michigan thanks to BOB YOUNG's leadership.

Back to my statistics. I also keep track of the number of questions each justice asks [laughter] at oral argument. As well as the number of courtroom laughs that each justice's remarks produce. Yup—keep track. In that same term that I talked about before, Bob asked far and away the most questions. He averaged 22 per argument; Justice Larsen was next with 7. [Laughter.] For those of you computationally challenged, Bob asked three times as many questions as the next most talkative justice. He is curious to his core. He simply loves the intellectual back and forth. He can't help it. As for laughs, again, he led the pack. Bob produced laughter in the courtroom seven to ten times more than most of his colleagues. And while I didn't keep track of this particular subcategory, as I remember it, a high percentage of those occasions were the result of Bob making fun of himself. The rest were making fun of me. [Laughter.] And it was wonderful. Thank you, Bob. [Applause.]

JUSTICE YOUNG: Thank you.

CHIEF JUSTICE MARKMAN: I would now like to ask Justice YOUNG if he would be amenable to unveiling the portrait, perhaps with the assistance of his family members. And thereafter, if you would be interested in addressing this Court.

JUSTICE YOUNG: That's not it. [Portrait of Justice ROBERT P. YOUNG is unveiled, followed by applause.] It's a transition—crimson to green and white.

May it please the Court. Chief Justice, members of the Court, honored guests. I did not make remarks today. I was hoping the muse would visit me. It hasn't. And that so many of you are here suggests to me that you were suffering, some large portion of you, from the misapprehension that this was my actual hanging rather than by effigy. [Laughter.] But I am here, BOB YOUNG, representing a judicial career of trials, tribulations, some triumphs, and many blessings. It's unusual to—as I understand it—at a traditional wake, for the honoree to have to say anything, much less have it be a rebuttal. But I must respond to many of the contumelies hurled during the several remarks, those invited and those not. [Laughter.]

But I want—I want first to begin with thanks to Lynn Seaks and Carolyn Adkins, who were responsible for hectoring me into doing this, which they knew I didn't want to do. And I also want to thank Bruce Courtade—where are you, Bruce—for also bludgeoning people into contributing to the comestibles that were downstairs. They told me—first, they got me to commit to a hanging date and then they said you have to pay for the food. So I was too far gone to do it, and I appreciated Bruce's help.

I also want to recognize my family, my wife—Linda Hotchkiss, of 43 years; we've been together since freshmen week at Harvard Yard, where we met—and

my two sons, Robert and Barrett, who have always helped me by reminding me I'm not all that. [Laughter.] And my brother, Michael, and Judy. Somebody mentioned that this—we just lost our mother. That's true. Maura mentioned to me that she had given a wonderful introduction to someone, and he said: "I wish my dad were here; he would have loved to heard it. I wish my mom were here, she would have believed it." [Laughter.] That—that's true here, too. She did, however, see the portrait because unlike the people who are sitting here who I've admonished to get the picture done before desiccation sets in [laughter], I went out early in my career and had Patricia Burnett do the portrait, as you can see, long before there was much gray showing. And since I did not want to rely on clerks to take up a collection—I mean, if you knew my clerks, you'd know how impossible that would be [laughter]—so I bought it myself. I paid for it. And since it was mine, I had to keep—protect it. So we put it in our dining room, which we never use, away from any public viewing of it. It faced the dining-room table where my youngest son, Barrett, did his homework. And I always said, I'm always watching you. [Laughter.] So she did see it, as did my dad.

What can you say about those who were asked, and some who were not, to speak tonight? Maura, you are in your eighth decade? [Laughter.] Uh, just—just saying. Maura, Cliff, Steve, and I were comrades in arms during the first 10 years of my life on this Court. I have many wonderful memories and some not-so-wonderful memories of the combat. I have many, healing now, defensive wounds from those first 10 years of combat; we were not a welcome change in this judicial firmament, and it was frequently ugly and difficult. And I deeply appreciated the support, emotionally and otherwise, intellectually, of my colleagues during those 10

years. That was probably the longest tenure on this Court where the composition didn't change, unfortunately. However—however, we survived, and we made what I thought were thoughtful, careful decisions that did, I hope, promote more predictability. If you could read a statute, you could pretty much predict what this Court was going to do with that statute. And that was a useful thing.

As a young-pup attorney, when I began practice, it was almost impossible to tell your client what was going to happen. You could give them a statute and say, this is what the statute says. It looks like you are on the right side of the line, but, you know, some judge might say otherwise. And that was the state of the world in Michigan when I began practice. And that was one of my impetus for agreeing to Governor—President, or as I call him on campus, fearless leader—Engler's importuning to avoid the 20 top-earning years of my life. [Laughter.]

And so let me, as I did in the beginning of my judicial career in 1995 at my investiture, thank my wife, Linda, for being—for her income [laughter] that allowed me to do this romp in the public service; without that, it would not have made the—made it possible.

John—what can you say about John? John ran toward the fire. He's now president of Michigan State, and he's literally a volunteer. He is volunteering his salary—he's giving his salary back to the university. He is a visionary. He was a visionary who understood why this Court needed to be anchored in the rule of law. And he consistently sought people both at the lower-court level and all levels of the judiciary, who would reflect a deference to the constitutional limitations, and that's a wonderful thing. And it's a wonderful tradition that this Court will continue.

I mentioned the—I'll get to you, Bridget. [Laughter.] I mentioned the dark decade. It was as painful a personal experience, as professional experience, as you can imagine. But it was not—it ended. The last six years of my term on the Court was an entirely different experience. It was a joy. We enjoyed ourselves; we had lots of fun. Cousin Ricky, is—I think he is boycotting [laughter], but he does come to our family reunions. I can't stop my crazy cousin from inviting him, and he comes. So we do have pictures with cousin Ricky at family reunions. We enjoyed one another. We had very serious, very contentious debates. If you think Justice MCCORMACK is an easy sell, you've got another think coming. But we managed during that transitional period to respect one another's views, to listen to them. I mean, the first thing is you've got to listen. And you've got to suspend, somewhat, your instinct to believe that the opposing view is unworthy of consideration, and we worked it out. It doesn't surprise me that we had as high accordance as we did among ourselves, because you certainly listen to reason. [Laughter.]

JUSTICE MCCORMACK: Is there a cut-off—

JUSTICE YOUNG: No, surrebuttal. I'm sorry. No, I—it was an unusual thing. We did have the Bob and Bridget show. Which was—almost from the very beginning, we had the first press conference, I think, in the Court history when we announced the language rule, there for the people who didn't have language ability so that they could participate in the judicial process. And we obviously enjoyed one another. We—and that led to this kind of different way of interacting. So I'm—I commend that to you. Keep that going, it's—it will help all of us if you do commit yourselves to listening,

laughing at yourselves a little bit, because we all want you to be successful. Because when you are successful, we are too.

I also, finally, want to recognize my clerk family. I am deeply honored that so many of my scarred former clerks have come. They do have some tics. I am—two of my—the first Supreme Court clerks are here, sitting next to each other right there. They are mostly healed; there are a few tics left, but one of the things I miss most about not being on the Court is interacting with the clerks. I had such joy working with and molding minds. [Laughter.] And fortunately, I don't face a Senate hearing so I don't care anymore what you say. But I do—I do want you to know how deeply appreciative I was of the interactions that I had with you. That was one of the most rewarding of my judicial experience.

So I think that should end the homily. It's late. I appreciate all of you coming. And let me just say one more time, it's too late for Steve, but get your portrait done now before the desecration comes. [Laughter.] Thank you, very much. [Applause.] Can we go now? She said I forgot Cliff. I forgot to acknowledge Cliff. [Laughter.]

JUSTICE MCCORMACK: He's going back to the podium.

JUSTICE YOUNG: I'm sorry. No, I'm sorry.

JUSTICE MCCORMACK: We're not going to give you another standing ovation if you stay here. [Laughter.]

JUSTICE YOUNG: No, I just want to acknowledge Cliff. I'm sorry. Because Miss Maura refused to let us sit together during most of the conferences, because—

JUSTICE CORRIGAN: You misbehaved.

JUSTICE YOUNG: I—we did not misbehave. We were just having our own commentary. Cliff—

JUSTICE CORRIGAN: —I had to separate you.

JUSTICE YOUNG: Yes—yes. That's why we called you Ms. Maura and Superior. [Laughter.] I just want to acknowledge very quickly—Cliff was incandescently bright. He is extraordinarily funny, less so than I remembered [laughter], and was a faithful friend and foil as we worked our way through all these intellectual challenges. I would be remiss if I didn't at least acknowledge because he lives near me and he will hurt me. Thank you. [Applause.]

CHIEF JUSTICE MARKMAN: I'd like to say one thing from the chair if I can here. Justice MCCORMACK said some very kind things, some very moving things about Bob's relationship with Linda. And I'd like to say something about his relationship with his children, although I would ask them maybe to close their ears if they wouldn't mind.

Bob and I, from time-to-time, would compare notes on our two boys—we each have two boys—and their upbringing. And our standards and our expectations were always modest and reasonable for our children. I think specifically [laughter]—I think specifically, could we keep them out of prison? [Laughter.] And I see that Bob has continued to succeed in that regard. And I want to celebrate that accomplishment, too. I know just how hard it has been over time to do that. So congratulations, Bob, on that as well.

I would now like to accept this portrait on behalf of the Court, including on behalf of Justice BERNSTEIN, who regrettably finds himself in some dead-end place like Venice this week. [Laughter.] And again, I would congratulate Justice YOUNG, his family, his friends, and his colleagues for what it is we are celebrating today. And concerning all of you here, those who we've mentioned and those who we haven't, those who we have

noticed today in some way and those who we haven't, we are really all so pleased to see all of you here at this somewhat difficult time of the day. And we thank you all for joining this evening—joining us this evening in celebrating this institution and in particular, the contributions to this institution of one of its very finest Justices, ROBERT YOUNG. We will now stand in adjournment. Thank you. [Applause.]

SUPREME COURT CASES

In re ERWIN

Docket Nos. 153980 and 153981. Argued April 12, 2018 (Calendar No. 1). Decided July 31, 2018. Opinion as amended by order of the Court entered October 5, 2018, at 503 Mich 876.

Beatrice King filed a petition in the Saginaw County Probate Court, seeking to open formal proceedings regarding the estate of her father, James Erwin, Sr., and to be appointed personal representative of the estate; the petition was granted. James had six children from a previous marriage—including Beatrice—when he married Maggie Erwin in 1968. James and Maggie had four children together, during which time they purchased a home in Saginaw. In 1976, Maggie moved out of the house and established a separate residence. James subsequently consented to a support order that provided financial assistance for Maggie and for their four children. In 2010, James and Maggie together sued James's employer to reinstate Maggie's health insurance coverage under his retiree medical benefits. During the proceedings, it was stated that Maggie was in poor health and that if she were to die, the loss to James would be irreparable; James made it clear that he was still married to Maggie and that they had an ongoing relationship. James and Maggie were still legally married when James died intestate in October 2012. Beatrice asked the court to determine whether Maggie was a surviving spouse for purposes of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. Beatrice asserted that Maggie was not a surviving spouse because she had been willfully absent from James for more than one year before his death and that Maggie was therefore ineligible under MCL 700.2801(2)(e)(*i*) to exercise her rights under EPIC. The court, Nancy L. Thane, J., determined that Maggie was James's surviving spouse for purposes of EPIC, and Beatrice appealed. The Court of Appeals, HOEKSTRA, P.J., and O'CONNELL and MURRAY, JJ., affirmed the probate court's orders in an unpublished per curiam opinion issued May 10, 2016 (Docket Nos. 323387 and 329264). Beatrice sought leave to appeal, and the Supreme Court granted the application. 501 Mich 872.

In an opinion by Justice WILDER, joined in full by Chief Justice MARKMAN and Justice ZAHRA and also joined by Justice CLEMENT

(except to the extent the opinion addresses whether evidence of physical absence is needed to support a finding that a spouse was willfully absent), the Supreme Court *held*:

An individual is not a surviving spouse for purposes of MCL 700.2801(2)(e)(*i*) if he or she was "willfully absent" from his or her spouse for the year or more leading up to the spouse's death. In order to be "willfully absent," an individual must have intended to be completely absent from his or her spouse. To determine whether a spouse was completely absent, courts should consider whether, under the totality of the circumstances, the spouse was emotionally and physically absent for the requisite period such that it resulted in a practical end to the marriage. The plain language of the statute does not require that an individual intended to abandon his or her marital rights to be found "willfully absent," only that he or she intended to be completely absent. The burden is on the party challenging an individual's status as a surviving spouse to show that he or she was "willfully absent" from the decedent spouse. *In re Peterson Estate*, 315 Mich App 423 (2016), was overruled to the extent it held that "willfully absent" encompasses only physical absence. In this case, Beatrice's claim failed because it rested solely on the allegation that Maggie was physically absent from James in the year leading up to James's death. Beatrice only presented evidence regarding their physical separation and did not refute evidence suggesting that James and Maggie retained an enduring emotional connection. Accordingly, the probate court did not clearly err by concluding that Maggie was a surviving spouse for purposes of EPIC, and the Court of Appeals correctly affirmed the probate court's order.

Affirmed.

Justice WILDER held that an individual is not a surviving spouse for purposes of MCL 700.2801(2)(e)(*i*) if he or she was "willfully absent" from his or her spouse for the year or more leading up to the spouse's death. In order to be "willfully absent," an individual must have intended to be completely absent from his or her spouse. To determine whether a spouse was completely absent, courts should consider whether, under the totality of the circumstances, the spouse was emotionally and physically absent for the requisite period such that it resulted in a practical end to the marriage. Justice WILDER also expressed the view that complete absence was required, both physical and emotional; physical absence was a necessary prerequisite for a finding of "willful absence" and a showing of emotional absence on its own was insufficient. Finally, Justice WILDER held that the plain language of the statute does not require that an individual intended to

abandon his or her marital rights to be found "willfully absent," only that he or she intended to be completely absent. The burden is on the party challenging an individual's status as a surviving spouse to show that he or she was "willfully absent" from the decedent spouse. *In re Peterson Estate*, 315 Mich App 423 (2016), was overruled to the extent it held that "willfully absent" encompasses only physical absence. In this case, Beatrice's claim failed because it rested solely on the allegation that Maggie was physically absent from James in the year leading up to James's death. Beatrice only presented evidence regarding their physical separation and did not refute evidence suggesting that James and Maggie retained an enduring emotional connection. Accordingly, the probate court did not clearly err by concluding that Maggie was a surviving spouse for purposes of EPIC, and the Court of Appeals correctly affirmed the probate court's order.

Justice CLEMENT, concurring in part, agreed with the majority that the Court of Appeals correctly affirmed the probate court's finding that Maggie was not "willfully absent" from James within the meaning of MCL 700.2801(2)(e)(*i*) and that the phrase "willfully absent" is broad enough to encompass emotional absence. The facts of the case necessitated resolution of whether the term includes consideration of the emotional bonds and connections between spouses. However, because it was undisputed that Maggie was physically absent from James for one year or more before his death, it was unnecessary for the majority to consider whether the phrase also requires a physical absence.

Justice VIVIANO, joined by Justices MCCORMACK and BERNSTEIN, dissenting, disagreed with the majority's analysis of the phrase "willfully absent" in MCL 700.2801(2)(e)(*i*). In light of the dictionary definition of "absent"—that is, not present, not in company, away—the critical aspect of the phrase is the lack of physical presence. Although there is an alternative definition of absent, "heedless; inattentive to persons present," a lack of physical presence is the more appropriate meaning given its context within the statute and the primary historical sense of the word; the definition on which the majority relied does not fit within the context of Subsection (2)(e)(*i*) because the provision requires a spouse to be absent for a year or more. Moreover, the definition of "absent" on which the majority relied—that is, "inattentiveness"—did not support its interpretation of the phrase "willfully absent" as encompassing complete emotional absence. Rather, that definition of "absent" on which the majority relied refers to a state of mental distraction and not to any emotional aspect; and, in any event, the majority did not cite any dictionary that

combines emotional inattentiveness and physical absence into a single definition of the word "absent." The majority rewrote the statute by knitting together two disparate and inconsistent definitions—effectively choosing a definition that incorporates "all of the above"—instead of choosing the contextually appropriate meaning. Justice VIVIANO agreed with the majority's statement that the statute does not require proof of an intent to abandon one's marital rights before an individual can be barred from inheriting under MCL 700.2801(2)(e)(*i*) but did not agree with other statements by the majority that appeared to require an intent to initiate conduct that he or she knows would result in the termination of the marriage. Justice VIVIANO stated that to be "*willfully* absent" for purposes of the statute, a spouse must be physically absent as a result of a unilateral decision by that spouse, as opposed to spouses who live apart by mutual choice. Contrary to the majority's interpretation, it does not make linguistic sense to consider, for purposes of Subsection (2)(e)(*i*), whether the absence was deliberate or intentional because no reasonable person would contend that an unintentional or involuntary separation was what the Legislature was guarding against when it enacted the provision. Reading the MCL 700.2801(2)(e)(*i*) term "absent" as meaning only physically absent would not render the provision surplusage; instead, although there is overlap between MCL 700.2801(2)(e)(*i*) (willfully absent) and MCL 700.2801(2)(e)(*ii*) (desertion), the two provisions are capable of different meanings. The majority's definition, which departed from the plain language of the statute, was not persuasive because the definition imported perceived requirements from certain neighboring provisions into the definition of "willfully absent" and at the same time failed to address other surrounding provisions. Because the record was sparse, Justice VIVIANO would have remanded the case to the probate court for a determination of whether Maggie was physically absent for one year or more before James's death as a result of Maggie's unilateral decision, considering any evidence bearing on the question.

1. ESTATES AND PROTECTED INDIVIDUALS CODE — SURVIVING-SPOUSE STATUS — WORDS AND PHRASES — "WILLFULLY ABSENT."

An individual is not a surviving spouse for purposes of MCL 700.2801(2)(e)(*i*) of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., if he or she was willfully absent from his or her spouse for the year or more leading up to the spouse's death; in order to be willfully absent, an individual must have intended to be completely absent from his or her spouse; to determine whether a spouse was completely absent, courts should consider

the totality of the circumstances and determine whether the spouse was emotionally and physically absent for the requisite period such that it resulted in a practical end to the marriage; there is no requirement that an individual intended to abandon his or her marital rights, only that he or she intended to be completely absent.

2. ESTATES AND PROTECTED INDIVIDUALS CODE — SURVIVING-SPOUSE STATUS — BURDEN OF PROOF.

For purposes of MCL 700.2801(2)(e)(*i*), the burden is on the party challenging an individual's status as a surviving spouse to show that he or she was "willfully absent" from the decedent spouse.

Commercial Law Corporation, PC (by *L. Fallasha Erwin*) for Beatrice King.

Valerie Kutz-Otway, PLC (by *Valerie Kutz-Otway*) for Maggie Erwin.

Amici Curiae:

Varnum (by *Charyn K. Hain* and *Christopher A. Ballard*) for the State Bar of Michigan Probate and Estate Planning Section.

WILDER, J. The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., governs the distribution of an individual's property at death. Among other reasons, the Legislature enacted it "[t]o promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors." MCL 700.1201. EPIC grants a decedent's surviving spouse certain rights. For example, the surviving spouse of a decedent who dies intestate—that is, without a will—may still take a share of the decedent's property. MCL 700.2202(1). In fact, even if the decedent dies testate—with a will—a surviving spouse may take a share different from that allocated by the will's plain terms. MCL 700.2202(2). However, not every spouse can rely on these rights. For example, a valid

divorce or annulment severs such reliance. MCL 700.2801(1). Alternatively, a spouse living in a bigamous relationship at the time of the decedent's death is also excluded. MCL 700.2801(2)(d). Although EPIC anticipates a number of other circumstances,[1] only one is at issue in the instant case: whether the surviving spouse was "willfully absent" from the decedent for more than one year before his death and is therefore ineligible under MCL 700.2801(2)(e)(*i*) to exercise her rights under EPIC.

This case turns on the meaning of "willfully absent" as used in MCL 700.2801(2)(e)(*i*). In the proceeding below, the Court of Appeals concluded that "willful absence for the purposes of the EPIC is a factual question that may concern more than physical proximity" and that a "trial court should determine whether a spouse is willfully absent . . . by considering all the facts and circumstances of the case." *In re Erwin Estate*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2016 (Docket Nos. 323387 and 329264), pp 2-3. We granted leave to consider two questions, both of first impression: (1) whether the term "willfully absent" is defined exclusively by physical separation, or whether it includes consideration of the emotional bonds and connections between spouses; and (2) whether MCL 700.2801(2)(e)(*i*) requires proof that a spouse intends to abandon his or her marital rights. For the reasons now discussed, we affirm.

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[1] For instance, a surviving spouse also does not include "[a]n individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death." MCL 700.2801(3)(b). Additionally, a surviving spouse does not include "[a]n individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual." MCL 700.2801(2)(b). See generally MCL 700.2801 for more examples.

I

The decedent, James Erwin, Sr., had six children from a previous marriage when he married appellee Maggie Erwin in 1968. James and Maggie went on to have four children together, bringing James's total number of children to 10. Several years after their wedding, James and Maggie bought a house in Saginaw. However, although remaining in Saginaw, Maggie moved out and established a separate residence in 1976. She subsequently petitioned James for financial assistance, and James consented to a support order that provided assistance for Maggie and for their children. But the two continued to live apart. There is no indication that they ever lived under the same roof again.

Decades later, in 2010, James and Maggie joined together as plaintiffs and sued James's employer to reinstate Maggie's health insurance coverage in accordance with his retiree medical benefits. The couple was represented by L. Fallasha Erwin, James's son from his first marriage. During the proceedings, it was stated that Maggie was in poor health and that if she were to die, the loss to James would be irreparable. James made it clear that Maggie was still his wife and that they had an ongoing relationship.

On October 12, 2012, James died intestate. James and Maggie had never filed for divorce, nor had they otherwise formally separated. In the eyes of the law, they very much remained married until the time of James's passing. As testament to this fact, Maggie was listed as James's surviving spouse on his death certificate.

Following his death, Maggie and James's children proceeded to sort through his estate informally. Yet all was not well with the related but distinct families that

James had fathered. Apparently dissatisfied with the communication and cooperation shown by Maggie and her four children, one of James's children from his first marriage, Beatrice King, represented by her attorney-brother, L. Fallasha Erwin, petitioned the probate court to open formal proceedings and to be appointed as the estate's personal representative. On June 12, 2013, eight months after James's death and with no other interested party objecting, the probate court granted Beatrice's petition.[2]

The probate court proceedings were contentious from the outset, with allegations of deceit and calls for sanctions. Both sides of James's family were involved and filed motions, only one of which is relevant to the case as it currently comes before us. In 2014, Beatrice asked the probate court to determine whether Maggie was a surviving spouse in accordance with EPIC. Beatrice argued, in part, that Maggie was not a surviving spouse under MCL 700.2801(2)(e)(*i*) because she was "willfully absent" from James in the years leading up to his death. If proved, because James died intestate, Maggie would not be an heir for the purposes of inheritance. She would not be entitled to a share of James's estate.

On May 31, 2014, the probate court held a hearing on Beatrice's motion, and on July 17, 2014, it decided that motion in Maggie's favor in a written opinion,

[2] The personal representative's duties include settling and distributing the decedent's estate in accordance with EPIC, "as expeditiously and efficiently as is consistent with the best interests of the estate." MCL 700.3703(1). In effect, the personal representative is in charge of the day-to-day probate proceedings and is answerable to the court. Although no interested party objected to Beatrice's appointment, allegations later surfaced that Maggie and her children had been misled to believe that Beatrice was not pursuing the position. L. Fallasha and Beatrice denied that charge.

ruling that Maggie was James's surviving spouse. Beatrice appealed, and the Court of Appeals affirmed the probate court's ruling. We subsequently granted Beatrice's application for leave to appeal, limited to the two questions described earlier.

II

We review de novo questions of statutory interpretation. *People v Buehler*, 477 Mich 18, 23; 727 NW2d 127 (2007). However, any underlying findings of fact are reviewed only for clear error. *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005); see MCR 2.613(C).

III

A

> For the purposes of EPIC, a surviving spouse does not include
>
> [a]n individual who . . . for 1 year or more before the death of the deceased person:
>
> (*i*) Was willfully absent from the decedent spouse. [MCL 700.2801(2)(e).]

With this in mind, we turn to the first question: whether the term "willfully absent" is defined exclusively by physical separation, or whether it includes consideration of the emotional bonds and connections between spouses.

1

As an initial matter, we note that EPIC does not define the term "willfully absent." Because our goal is to glean legislative intent from the plain meaning of statutory language, *Wickens v Oakwood Healthcare*

Sys, 465 Mich 53, 60; 631 NW2d 686 (2001), the dictionary is our first point of reference to determine the term's significance, *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). The common understanding and the traditional legal usage of a term also guide our interpretation. *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007); see also MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.").

MCL 700.2801(2)(e)(*i*) uses the term "absent" as an adjective to describe a person's conduct in relation to his or her spouse. In this context, "absent" could mean that someone is missing, not present, or, alternatively, that a person is exhibiting inattentiveness toward another. *The American Heritage Dictionary* (2d ed); *Merriam-Webster's Collegiate Dictionary* (11th ed).[3] The word "willful," whether or not used as a legal term of art, describes an act that is voluntary, deliberate, and intentional. *Random House Webster's* (2d ed); *Black's Law Dictionary* (8th ed). But the intent to commit any act does not, by itself, render it "willful." Rather, a "willful" act is one that is taken with the intent to do something specific. *Jennings v Southwood*, 446 Mich 125, 140; 521 NW2d 230 (1994); cf. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983) (explaining that a willful act is one committed with the specific intent to bring about the particular result the statute

[3] We agree with the dissent that there is no meaningful difference between the dictionary definitions cited in this opinion and those cited by the dissent. See *post* at 32 n 11.

seeks to prohibit).[4] Taken together, these definitions indicate that the phrase "willfully absent," as used in MCL 700.2801(2)(e)(*i*), requires that the surviving spouse act with the intent to be away from his or her spouse for a continuous period of one year immediately preceding the death.

However, while the plain language of MCL 700.2801(2)(e)(*i*) suggests that the term "absent" may refer to physical separation or a lack of emotional support in the form of inattentiveness, it does not tell us specifically whether the term refers exclusively to the physical or whether it includes an emotional element. As such, we turn to neighboring statutory provisions for additional context. See *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) ("[I]t is . . . well established that to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole."); *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005) (noting that the meaning of statutory language, plain or otherwise, always depends on context). With regard to the neighboring provisions, in addition to excluding one who is "willfully absent," the definition of surviving spouse also excludes those

[4] The dissent would prefer to understand "willful" to mean "to make a decision on one's own, without regard to others," or, as it later characterizes it, to make a "unilateral decision." *Post* at 37, 38. The dissent argues that this is how the term is commonly understood in the "context of human interaction," because "[l]inguistically, it does not make much sense to think of a person's absence from their spouse under EPIC in terms of whether the absence was 'deliberate' or 'intentional.' " *Post* at 37. We find this reasoning unpersuasive. After all, although some "deliberate" decisions may not be "unilateral," all "unilateral" decisions are, by their very nature, "deliberate." Moreover, unlike the dissent, we have at least cited caselaw that supports our understanding of "willful" as an act that is taken with the intent to do something specific.

> who did any of the following for 1 year or more before the death of the deceased person:
>
> * * *
>
> (*ii*) Deserted the decedent spouse.
>
> (*iii*) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law. [MCL 700.2801(2)(e).]

Taking MCL 700.2801(2)(e)(*ii*) first, when deployed as a transitive verb, as here, the term "to desert" is commonly used as a synonym for abandon—to forsake or leave someone. *The American Heritage Dictionary* (2d ed); *Merriam-Webster's Collegiate Dictionary* (11th ed). This common meaning mirrors the traditional legal usage of the term "desertion" in the context of divorce. In that context, a husband or wife deserted his or her spouse when the husband or wife ceased cohabitation and physically departed without the intent to return. *Fanner v Fanner*, 326 Mich 466, 467; 40 NW2d 225 (1949); see also *People v Dunston*, 173 Mich 368, 373; 138 NW 1047 (1912) (noting that, for purposes of the crime of desertion or abandonment, the term "desertion" meant to separate physically without the intent to resume marital relations).[5] Therefore, although in theory an individual could desert a spouse emotionally, the verb's common connotation in conjunction with its traditional legal meaning tells us that MCL 700.2801(2)(e)(*ii*) most likely uses the term "de-

[5] The traditional use of desertion as a ground for divorce has disappeared since the Legislature enacted the no-fault divorce act, 1971 PA 75, in 1971. *Sparks v Sparks*, 440 Mich 141, 156-157; 485 NW2d 893 (1992). Since that time, a divorce can be sought on the basis that there has been "a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." MCL 552.6(1). Nothing more is required.

serted" to describe a purely physical distance. Accordingly, an individual deserts his or her spouse within the meaning of MCL 700.2801(2)(e)(*ii*) if he or she physically leaves the marital home with the intent never to return and the spouse dies more than a year later.

MCL 700.2801(2)(e)(*ii*) permits us to draw an important inference. If we interpret the word "absent" as used in MCL 700.2801(2)(e)(*i*) to refer only to physical absence, there would be an almost complete overlap between MCL 700.2801(2)(e)(*i*) and (*ii*). That is, an individual who "deserts" his or her spouse in the year or more before the spouse's death will always have been "willfully absent."[6] This would render MCL 700.2801(2)(e)(*i*) redundant and counsels against equating the term solely with physical absence. *Wickens*, 465 Mich at 60.[7]

Next, we examine MCL 700.2801(2)(e)(*iii*). A natural reading of that subparagraph indicates that the phrase "to provide support for the decedent spouse if required to do so by law" modifies the verbs "refused" and "neglected." Therefore, an individual is not a surviving

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[6] The difference between the two provisions would turn on whether there was an intent to leave and never return as in MCL 700.2801(2)(e)(*ii*), or simply an intent to leave as in MCL 700.2801(2)(e)(*i*). In practice then, if the subsections were both interpreted to involve physical separation only, a party would never need to demonstrate a spouse's intent never to return. It would be simpler just to argue that the spouse intended to leave.

[7] The dissent disagrees that MCL 700.2801(2)(e)(*i*) would be rendered redundant if the term "absent" were interpreted to encompass only physical absence. See *post* at 40. Assuming the validity of the law cited by the dissent as it relates to a now-defunct component of domestic-relations law, see note 5 of this opinion, the fact remains that if absence under MCL 700.2801(2)(e)(*i*) were limited to physical absence, for practical purposes, a party would never need to demonstrate a spouse's intent not to return. See note 6 of this opinion.

spouse within the meaning of MCL 700.2801(2)(e)(*iii*) if he or she "[w]illfully neglected . . . to provide support for the decedent spouse if required to do so by law," or "refused to provide support for the decedent spouse if required to do so by law."

Generally, spousal support is mandated by law only in two situations. The first involves divorce. MCL 552.23. However, divorcees are not surviving spouses for the purposes of EPIC. MCL 700.2801(1). As a result, MCL 700.2801(2)(e)(*iii*) cannot be referring to spousal support following a divorce. See *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."). That leaves an action for separate maintenance—the second situation in which spousal support can be mandated—which can be filed by an individual based on the same grounds as an action for divorce, MCL 552.7, but in circumstances in which a divorce is not pursued or cannot be obtained.

As already stated, the word "willfully" refers to an intent to do something specific. "Neglected," on the other hand, means to fail to give the proper attention to something, or otherwise to leave it undone; "refused" simply means to decline to do something. *The American Heritage Dictionary* (2d ed); *Merriam-Webster's Collegiate Dictionary* (11th ed). Accordingly, for the purposes of MCL 700.2801(2)(e)(*iii*), an individual is not a surviving spouse if he or she intentionally fails or flatly refuses to pay legally required separate maintenance for the year or more leading up to his or her spouse's death.

When viewed side by side, it becomes clear that MCL 700.2801(2)(e)(*ii*) and (*iii*) are not connected by an individual's physical proximity in relation to his or

her spouse, and we cannot therefore infer that MCL 700.2801(2)(e)(*i*) refers solely to physical absence by its mere association with its neighboring provisions. Cf. *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010) (denoting that neighboring statutory provisions should be read in harmony with one another). Yet, another connection does bond these otherwise disparate subsections. Both MCL 700.2801(2)(e)(*ii*) and (*iii*) describe acts on behalf of a surviving spouse that for all intents and purposes are inconsistent with the very existence of a legal marriage. This is either by a spouse refusing to provide required support or by simply abandoning the other without an intent to return. In other words, MCL 700.2801(2)(e)(*ii*) and (*iii*) involve intentional acts that bring about a situation of divorce in practice, even when the legal marriage has not been formally dissolved. MCL 700.2801(2)(e)(*i*) should be interpreted with this context in mind. See *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (explaining that statutory provisions must be interpreted in the context of the law as a whole).[8]

A comprehensive review of the statutory scheme confirms that the term "willfully absent" should be interpreted consistently with this observation. See *Jackson*, 487 Mich at 791. Not only is "[a]n individual who is divorced from the decedent or whose marriage to the decedent has been annulled . . . not a surviving spouse" for purposes of EPIC, MCL 700.2801(1), but

[8] The dissent accuses us of failing to apply any canon of statutory interpretation in coming to this conclusion. *Post* at 40 n 37. It is true that we have not explicitly named the canons in our opinion, and we were unaware that such formulism was necessary to render a proper textualist decision. Yet a careful reading of our opinion and accompanying citations clearly illustrates that we have applied the established rules of interpretation. See, e.g., *Robinson*, 486 Mich at 15; *Griffith*, 472 Mich at 533; *Jackson*, 487 Mich at 791.

also "[a]n individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in [Michigan]" is not a surviving spouse, MCL 700.2801(2)(a). And this includes "[a]n individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual." MCL 700.2801(2)(b). These provisions all describe a situation in which, in effect, a spouse has initiated conduct that results in the complete dissolution of his or her marriage, either in fact or in practice. In those circumstances, an individual, even if legally a surviving spouse, cannot avail himself or herself of all the statutory rights inherent in that title.

Taking all this into consideration, it is clear that the term "willfully absent" cannot be defined exclusively by physical separation. Simply put, there must be something more than a mere physical distance. There are, after all, countless situations in which spouses choose to be physically separated but do not want to interrupt or even weaken their marital relationship. Some married couples are separated by occupation—for example, when a spouse intentionally takes a better job in a neighboring region so that he or she may provide more comfortably for their family—while others are separated by civic duty—like when a member of the armed forces is deployed overseas in service to this nation. But these circumstances alone reveal no desire to destroy or undermine the marriage, and a committed spouse should not forfeit his or her inheritance on the basis of the erroneous assumption that a physical distance prevented the continued pursuit of an otherwise loving and supportive relationship. If two married people decide to live apart but maintain an element of

emotional support and contact, courts have no business second-guessing that life decision.

As a result, when MCL 700.2801(2)(e)(*i*) is read in this proper context, the following explication becomes clear: willful absence requires consideration of the totality of the circumstances. It presents a factual question for the trial court to answer: whether a spouse's complete absence brought about a practical end to the marriage.[9] The burden is on the party challenging a legal spouse's status to show that the spouse was in fact "willfully absent" for the year or more leading up to the decedent's death. See *In re LaFreniere's Estate*, 316 Mich 285, 291; 25 NW2d 252 (1946) ("[W]here exceptions to an account are of an affirmative nature . . . the burden of sustaining such exceptions rests on the contestant."). Although an intentional physical absence is necessary to a finding of willful absence, without additional indicia of a complete absence in terms of emotional support and contact, courts should conclude that the marriage endured and allow the remaining legal spouse to retain his or her "surviving spouse" status.[10]

2

The dissent contends that "absent" in this context refers only to physical absence. In doing so, it states

[9] Rather than placing an unworkable focus on how inattentive a spouse must be in order to be "absent" within the meaning of MCL 700.2801(2)(e)(*i*), see *post* at 33 n 17, instead, the trial court should ascertain whether that spouse has been *completely* absent from the other, both emotionally and physically.

[10] Forfeitures are not favored in law. *Miller v Pond*, 214 Mich 186, 190; 183 NW 24 (1921). This general rule supports our conclusion that neither physical nor emotional absence in isolation is sufficient for purposes of MCL 700.2801(2)(e)(*i*). Rather, a complete absence is required, both physical *and* emotional.

that the "critical aspect" of absence is the lack of physical presence, because a dictionary defines "absent" as "not present" or "away." *Post* at 32. Unfortunately, the sum total of the dissent's analysis on this point is a string citation to dictionaries that define absence in terms of physical presence. See *post* at 32 n 13. We do not disagree that "absent" can be understood in physical terms. And we are not surprised to find that multiple dictionaries define absence in this way. The question here is not whether physical absence is a "critical aspect" of absence in general—we agree that it is in this case—but whether, in the context of MCL 700.2801(2)(e)(*i*), absence relates solely to physical absence. This is where our disagreement lies.

While the dissent apparently agrees that "absent" can be defined as either a lack of physical presence or emotional inattentiveness, see *post* at 32-33, it nonetheless argues that these definitions are mutually exclusive and that therefore it is improper to define "absent" to encompass both definitions, see *post* at 35 n 26 ("[O]ne definition requires a person to be *physically absent*, i.e., 'not present; not in company; away,' while the other, as it pertains to human interaction, requires in its ordinary usage a person to be *physically present* . . . ."). We disagree with the dissent that in order to be "inattentive" one must also be "physically present." One who is physically absent can still be "attentive" by providing emotional support and communication; conversely, one who is physically absent can also be "inattentive" by withholding emotional support and communication.[11] Accordingly, we do not believe that

[11] Despite the dissent's own proclamations to the contrary, there is nothing outlandish about stating that emotional support and communication can be absent from a personal relationship, nor with characterizing one who withholds such support as being emotionally absent from that relationship. The dissent's chosen dictionary definitions do not

physical distance and inattentiveness are "logically inconsistent," *post* at 35 n 26, because neither concept is necessarily dependent upon the other.[12]

More fundamentally, the dissent contends that when interpreting a statute, the interpreter must choose the single most appropriate dictionary definition of a term, rather than relying on multiple definitions. See *post* at 35 n 26. The dissent also contends that "[b]y knitting together . . . disparate definitions, the majority creates its own definition . . . instead of choosing the contextually appropriate meaning." *Post* at 35-36. We disagree. When consulting a dictionary, this Court does not relinquish its duty to exercise its best interpretive judgment. In this way, the dictionary should be seen as a tool to facilitate those judgments, not conclu-

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undermine this point. Cf. *post* at 34 (stating that dictionaries refer to absence in various ways, including, but not limited to, " 'not attentive,' " " 'inattentive,' " and " 'paying no attention to' ") (citations omitted).

[12] The dissent cites a dictionary that defines the term "absent," in part, in relation to physical proximity. See *post* at 33 ("[H]eedless; inattentive to persons present or to subjects of conversation in company.") (quotation marks and citation omitted). However, "heedless" can be defined as "INCONSIDERATE" or "THOUGHTLESS," *Merriam-Webster's Collegiate Dictionary* (11th ed), the understandings of which are not inconsistent with a finding of physical presence. Contra *post* at 35 n 26 ("[O]ne definition requires a person to be *physically absent* . . . while the other, as it pertains to human interaction, requires in its ordinary usage a person to be *physically present* . . . ."). Moreover, other dictionaries define "absent" as merely meaning "inattentive," without regard to whether there is a physical presence. See *Webster's Third New International Dictionary* ("INATTENTIVE"); *The American Heritage Dictionary of the English Language* (5th ed) ("[e]xhibiting or feeling inattentiveness"); *The Random House Dictionary of The English Language* (2d ed) ("not attentive; preoccupied; absent-minded"). For this reason, we consider the dissent's insinuation that we are engaging in "definition-shopping" to be extravagant. See *post* at 36 n 27 ("There are many ways that 'an uncritical approach to dictionaries can mislead judges . . . .' Not surprisingly, definition-shopping is high on the list.") (citation omitted).

sively resolve linguistic questions.[13] It is one thing to "knit together" disparate and incompatible definitions, as, for example, by concluding that a "horse" refers both to the familiar animal and also to a frame or structure on which something is mounted or supported. It is quite another to insist on a single definition when there are multiple choices with slight shades of different meaning, each of which is reasonably understood to apply to a term in a particular context. Unlike the dissent, we believe that "absent" is a term broad enough to reasonably encompass both cited definitions and that the overall context and manifest purpose of the statute under inquiry renders both definitions appropriately applicable. These two definitions are not in tension in any way, they are not logically incompatible in any manner, and each describes a subtly different understanding of "absent" that is both relevant and necessary to give full and complete meaning to the statute at issue here.

"Absent" in the course of describing a human relationship, particularly that between husband and wife, might fairly describe aspects of *both* physical and emotional proximity. The dissent is entitled to yoke itself to a single definition that remains within the boundaries set forth by a single dictionary, but we prefer to rely on the dictionary as a tool for supplying

[13] See *Yates v United States*, 574 US ___, ___; 135 S Ct 1074, 1081; 191 L Ed 2d 64 (2015) (opinion by Ginsburg, J.) (explaining that dictionary definitions bear consideration in determining the meaning of a word but that they are not always dispositive); *id*. at ___; 135 S Ct at 1092 (Kagan, J., dissenting) (agreeing that dictionary definitions do not control if other textual markers suggest that a different definition is appropriate); see also *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) (stating that courts *may* consult a dictionary to give words their common and ordinary meaning, not that they *must* consult a dictionary or that they must choose a single definition from among many).

the most reasonable definition of a term in its most relevant context. The Legislature is not confined to a single dictionary definition of a term when enacting a law, and neither should this Court be so limited when interpreting that law. The dictionary is but one data point; it guides our analysis, but it does not by itself settle it. The primary obligation of this Court "is to ascertain and effectuate the intent of the Legislature" in light of the language of the statutory provision and the context in which it appears. *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007). We believe that we have reasonably interpreted the text at issue and that we have thus fulfilled this duty.

For the reasons stated, we conclude that, in this context, "absent" is most reasonably defined as referring to complete physical and emotional absence from the deceased spouse. This definition is consistent with the statutory scheme as a whole, which contemplates that one only loses his or her status as a "surviving spouse" if he or she takes action that is akin to a complete repudiation of the marriage. Moreover, this interpretation gives independent meaning to the "desertion" and "willfully absent" provisions and avoids rendering either provision redundant.

3

In the proceeding below, the Court of Appeals came to a similar conclusion. It ruled that "willful absence for the purposes of the EPIC is a factual question that may concern more than physical proximity." *Erwin*, unpub op at 3. As with our analysis, the Court of Appeals observed that a dictionary alone could not resolve the question before it, *id*. at 3-4, and it also turned to MCL 700.2801(2)(e)(*ii*) and (*iii*) to develop its view that mere physical separation was insufficient,

id. at 4. Rather than sticking with a purely textual analysis, the Court of Appeals considered past precedent. The Court noted that an earlier case, *In re Harris Estate*, 151 Mich App 780; 391 NW2d 487 (1986), had construed a similarly worded statute, see MCL 700.290, as amended by 1980 PA 396,[14] and that the Court of Appeals in *Harris* had determined that the term "willfully absent" "encompassed 'emotional as well as physical absence . . . .' " *Erwin*, unpub op at 4, quoting *Harris*, 151 Mich App at 785. As the *Erwin* Court observed, the *Harris* Court had reasoned that " '[p]hysical presence in the marital home is strong evidence that the party remains involved in the marriage to some degree' " and that "a non-surviving spouse must show 'actions indicating a conscious decision to permanently no longer be involved in the marriage.' " *Erwin*, unpub op at 4 (alteration in original), quoting *Harris*, 151 Mich App at 786. The *Erwin* Court then held that a "physical separation [was] only one piece of evidence that the trial court may consider and weigh when determining whether one spouse was willfully absent from another." *Erwin*, unpub op at 5.

Yet in *In re Peterson Estate*, 315 Mich App 423; 889 NW2d 753 (2016), which was decided just weeks after the instant case, the Court of Appeals came to a different determination. There, the Court of Appeals

[14] As the Court of Appeals noted in *Harris*, "[t]he Revised Probate Code provides that a surviving spouse may elect against the will of his deceased spouse and may claim certain allowances from the estate. However, MCL 700.290 states that the rights provided by such statutes are forfeited if the surviving spouse 'did any of the following for 1 year or more previous to the death of the deceased spouse: (a) Was *wilfully absent* from the decedent spouse.' " *Harris*, 151 Mich App at 783, quoting MCL 700.290 (citations omitted; emphasis added). As can be seen, and as the Court of Appeals in *Erwin* noted, the language of the now-repealed MCL 700.290 is almost identical to the language of MCL 700.2801. *Erwin*, unpub op at 4.

held that the phrase "willfully absent," as used in MCL 700.2801(2)(e)(*i*), referred to physical absence only. *Id*. at 432. Relying on a dictionary definition, the Court suggested that "[t]he word 'absent' ordinarily refers to being physically away." *Id*., citing *The Oxford English Dictionary* (2d ed). And although the Court of Appeals recognized that absence could figuratively refer to both physical proximity and emotional support, without clear direction from the statutory text, it limited the term to the former meaning. *Peterson*, 315 Mich App at 432. Interestingly, the Court of Appeals in *Peterson* also reviewed the earlier decision in *Harris*. But it determined that the *Harris* Court had concluded that "willfully absent" referred solely to physical absence. *Id*. at 431-432. The Court of Appeals in *Peterson* therefore saw *Harris* as supporting its position that the term "willfully absent," as used in MCL 700.2801(2)(e)(*i*), encompassed only physical absence. *Id*. at 432. In that Court's view, an individual was not a surviving spouse for purposes of MCL 700.2801(2)(e)(*i*) if he or she was intentionally physically absent from his or her spouse for the year or more leading up to the spouse's passing. *Id*. at 432-433.

We agree with the Court of Appeals' analysis in the case at bar and reiterate that an individual is not a surviving spouse for purposes of MCL 700.2801(2)(e)(*i*) if he or she intended to be both physically and emotionally absent for the year or more leading up to the deceased spouse's passing. *Peterson* is overruled to the extent that it concluded otherwise.[15]

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[15] However, we agree with the Court of Appeals' conclusion in *Peterson* that the absence described in MCL 700.2801(2)(e)(*i*) must be continuous for at least a year leading up to the spouse's death. *Peterson*, 315 Mich App at 432-433. We also agree that the statute does not require the surviving spouse to make a continuous effort to maintain the marital

B

We now turn to the second question: whether MCL 700.2801(2)(e)(*i*) requires proof that a spouse intended to abandon his or her marital rights.

We note that the plain language of the statute evinces no express requirement that an individual intend to abandon his or her marital rights before being excluded as a surviving spouse pursuant to MCL 700.2801(2)(e)(*i*). Indeed, the statute's text clearly includes a different requisite intent: that of being "willfully" absent. We are not at liberty to ignore this unambiguous legislative directive. *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999). As a result, the only intent that a spouse must have is to be "absent." Therefore, a party seeking to establish that a spouse is not a surviving spouse pursuant to MCL 700.2801(2)(e)(*i*) does not need to show that the spouse intended to dissolve the marriage, only that the surviving spouse intended to be absent from the decedent spouse.

The notion that MCL 700.2801(2)(e)(*i*) requires a showing that an individual intended to abandon his or her marital rights comes from *In re Harris*. The Court of Appeals read that intent into the statute in light of its recognition that forfeitures are disfavored in the eyes of the law. *Harris*, 151 Mich App at 786, citing *Miller v Pond*, 214 Mich 186; 183 NW 24 (1921). When rendering its decision, the *Peterson* Court disagreed with the conclusion reached in *Harris*, stating that "[t]he Legislature did not include such a requirement, and we are not at liberty to read one into the statute." *Peterson*, 315 Mich App at 433. We agree with the

relationship. *Id*. at 434. That is, the inquiry is into whether the surviving spouse did the "absenting," not whether the surviving spouse did enough to prevent the absence.

conclusion reached by *Peterson*. MCL 700.2801(2)(e)(*i*) does not require proof that a spouse intends to abandon his or her marital rights.[16] Courts should not resort to judicial construction when the words of the Legislature are clear and unambiguous. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

IV

In the present case, the following is not in dispute. James and Maggie were married in 1968. In 1973 they bought a marital home together in Saginaw as tenants by the entireties. Maggie left the marital home in 1975 and took residence at a separate address, but she remained only a few miles away, still in Saginaw. Shortly thereafter, she sought financial support and James agreed to pay. Neither party disagrees that Maggie was physically absent from the marital home in the years that followed, intentionally so, and neither party disputes that James and Maggie Erwin remained legally married until James's death. Maggie is even listed as the surviving spouse on James's death certificate, and she is the named beneficiary of his life insurance policy. Therefore, the question is whether, given the totality of the circumstances, Maggie intended to be physically and emotionally absent from James, resulting in a practical end to their marriage.

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[16] The dissent insinuates that we agree with the *Peterson* Court on the one hand but disagree with it on the other. See *post* at 36 & n 28. This misconstrues our position, in which we illustrate that there is a difference between actions taken with the intent to abandon marital rights and actions taken that have the practical effect of ending a marriage regardless of the intent. In other words, "willful," as used in this provision, refers to an intent to be completely absent, which effectively results in a practical end of the marriage, regardless of whether the spouse specifically intended to end the marriage when he or she took such action.

Unfortunately for Beatrice, the record in this case is sparse. Before the probate court, Beatrice asserted that Maggie was not a surviving spouse and moved for a declaration of her status as a nonsurviving spouse pursuant to EPIC. But her claim rested solely on the allegation that Maggie and James did not cohabitate for over 36 years, and she provided nothing more in support of her claim than evidence of this fact. Beatrice never argued that Maggie and James had severed all emotional connections or that they did not in some way provide one another with emotional support. And other evidence in the record—specifically that in 2010 James filed a breach of contract action against his employer to ensure that the employer resumed providing medical coverage to Maggie as James's spouse—suggests that James and Maggie remained married up until the time of James's death. At a minimum, this lawsuit indicates that, not long before his death, James felt that losing Maggie would have been an irreparable loss and that in his eyes and hers, they were still husband and wife. As already stated, while physical separation is necessary for a finding that a spouse is not a surviving spouse for the purposes of EPIC, physical separation alone is insufficient. Because Beatrice only provided evidence of physical separation between Maggie and James and did not refute the evidence tending to show the enduring emotional connections between them, her claim necessarily fails.[17]

On the meager record before it, the probate court understandably ruled that Maggie was the surviving

[17] In earlier proceedings, Beatrice objected to the legitimacy of the evidence relating to the 2010 action against James's employer to reinstate healthcare coverage for Maggie as James's spouse. But we observe that the healthcare case was handled by Beatrice's brother and current attorney, L. Fallasha Erwin, who has freely admitted that he argued in the healthcare case that James and Maggie were still married.

spouse of James for purposes of EPIC. The probate court recognized that the couple had not resided together for many years but found that the couple had chosen a separated lifestyle rather than a complete end to their marriage. In the probate court's eyes, the couple's relationship was ongoing and included contact up until James's death. We find no clear error in this factual determination. The probate court could only rule on the evidence before it.

The Court of Appeals correctly affirmed the probate court. It observed that Beatrice had argued solely that Maggie and James were physically separated for more than a year and that this evidence was insufficient as a matter of law to establish that Maggie was "willfully absent." We agree with the Court of Appeals' conclusion and affirm.

V

We hold that an individual is not a surviving spouse for the purposes of MCL 700.2801(2)(e)(*i*) if he or she intended to be absent from his or her spouse for the year or more leading up to the spouse's death. Absence in this context presents a factual inquiry based on the totality of the circumstances, and courts should evaluate whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes.[18] The burden is on the party challenging

[18] We agree with the dissent that the interpretation of a statute is a purely legal question and that statutory interpretation presents a question of law. See *post* at 29 n 2. Having defined the statutory term "willfully absent" as meaning complete emotional and physical absence from the marriage, we believe it prudent and perhaps instructive to offer guidance to trial courts that in order to ascertain whether complete absence existed, an inquiry into the facts of the case may be required. Accord *post* at 41 n 38 (stating that the dissent would direct the trial court to consider all the facts at its disposal). For this reason, we reject the dissent's accusation that we put the "cart before the horse." *Post* at 29 n 2.

an individual's status as a surviving spouse to show that he or she was "willfully absent," physically and emotionally, from the decedent spouse. Because the Court of Appeals in the present case correctly concluded that Maggie was not "willfully absent" from James in the years leading up to his death, we affirm. We decline to address the remaining issues presented in the application for leave to appeal because we are not persuaded that they should be reviewed by this Court.

MARKMAN, C.J., and ZAHRA, J., and CLEMENT, J. (except to the extent the opinion addresses whether evidence of physical absence is needed to support a finding that a spouse was willfully absent) concurred with WILDER, J.

CLEMENT, J. (*concurring in part*). I support the result reached by the majority—the Court of Appeals rightly affirmed the trial court's finding that Maggie was not "willfully absent" from James. I also agree with the majority that the term "willfully absent" is broad enough to encompass emotional absence. But I write separately because I do not support the majority's proposition that "intentional physical absence is necessary" to support a finding that a spouse is "willfully absent" under MCL 700.2801(2)(e)(*i*). *Ante* at 17.

This case squarely presents the question whether the term "willfully absent" in MCL 700.2801(2)(e)(*i*) "includes consideration of the emotional bonds and connections between spouses," *ante* at 6, and so it is proper for the majority (and the dissent for that matter) to wrestle with that question. But this case does not present the question whether the term "will-

fully absent" requires physical absence; nor do the facts of this case allow that proposition to be tested since neither party disputes that Maggie was physically absent from James. See *ante* at 25; *post* at 41. In short, the majority's proposition in no way bears on the outcome of this case, and so I view the proposition as obiter dictum.

To be fair, a physical-absence requirement is unlikely to cause mischief—I don't doubt that in a typical case, a finding that a spouse was "willfully absent" will be supported by, among other things, record evidence of physical absence. But I would prefer that the majority's proposition become enshrined in law only after we consider a case in which that proposition plays a deciding role.

VIVIANO, J. (*dissenting*). The majority today holds "that an individual is not a surviving spouse for the purposes of MCL 700.2801(2)(e)(*i*) if he or she intended to be absent from his or her spouse for the year or more leading up to the spouse's death."[1] Further, the majority states that "[a]bsence in this context presents a factual inquiry based on the totality of the circumstances, and courts should evaluate whether *complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes*."[2] Because I conclude that the "willfully absent" provision in the forfeiture statute, MCL 700.2801(2)(e)(*i*), by its plain language, refers to a person who is physically absent

[1] *Ante* at 27.

[2] *Ante* at 27 (emphasis added). I do not understand why the majority frames this issue as a "factual inquiry" when the interpretation of a statute is a purely legal question. See, e.g., *Koontz v Ameritech Servs Inc*, 466 Mich 304, 309; 645 NW2d 34 (2002) ("Issues of statutory interpretation are questions of law that we review de novo."). The majority appears to be putting the cart before the horse.

from the decedent spouse as a result of his or her unilateral decision, I dissent.

James Erwin, Sr., died intestate and, consequently, MCL 700.2101(1) of the Estates and Protected Individuals Code (EPIC)[3] controls the disposition of his estate. Under EPIC, a surviving spouse is entitled to an intestate share from his or her decedent spouse's estate.[4] Appellee Maggie Erwin seeks to collect, as James's surviving spouse, this share from James's estate. Appellant Beatrice King challenges Maggie's status as a surviving spouse under EPIC's forfeiture provision, MCL 700.2801, alleging that Maggie "[w]as willfully absent from the decedent spouse"[5] and therefore cannot take the surviving-spouse share. Thus, this case turns on the proper meaning of "willfully absent."

The statute, in relevant part, lists three situations in which a "surviving spouse" forfeits his or her entitlement to collect the intestate share:

> An individual who did any of the following for 1 year or more before the death of the deceased person:
>
> (*i*) Was willfully absent from the decedent spouse.
>
> (*ii*) Deserted the decedent spouse.
>
> (*iii*) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law.[6]

This provision was first added as part of the Revised Probate Code (RPC), which was enacted in 1978.[7] When

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[3] MCL 700.1101 *et seq*.

[4] MCL 700.2102.

[5] MCL 700.2801(e)(*i*).

[6] MCL 700.2801(2)(e).

[7] 1978 PA 642, § 290; see also Lowe, *EPIC—New Probate and Trust Legislation for the New Millennium*, 79 Mich B J 330 (2000); see also V Michigan Compiled Laws of 1979, § 700.141 (stating that the statute was "[n]ew 1978, p 2470, Act 642, Eff. July 1, 1979").

the RPC was later replaced by EPIC in 2000, the forfeiture provision remained substantively unchanged.[8]

The forfeiture provision was included in the RPC as part of a package of changes to the surviving-spouse provisions. In the Probate Code of 1939, a surviving spouse would split the intestate estate with the parents or children of the decedent.[9] With the passage of the RPC, however, a surviving spouse was permitted to take a much larger share of the estate. Under the RPC, the surviving spouse was permitted to take the first $60,000 and then split the remaining balance of the intestate estate.[10] At the same time the Legislature

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[8] 1998 PA 386, § 2801(2)(e)(*ii*), effective Apr 1, 2000. The RPC and EPIC incorporated some, but not all, of the provisions of the Uniform Probate Code (UPC)—in fact, "[o]ne of the most important aspects of EPIC is that it is a true integration of the UPC while retaining unique and essential features of current Michigan law." *EPIC—New Probate and Trust Legislation for the New Millennium*, 79 Mich B J at 330. See also Payne, *Michigan Probate* (St. Paul: Thomson/West, 2017), § 1.2, p 3 ("[W]ithin 11 years [after adoption of the RPC], the Council of the Probate and Estate Planning Section of the State Bar began a review of the Code. One aim of the Council was to bring Michigan probate law closer to the [UPC]. The Council also wanted to amend the Code so that it would better address current planning practice."). The forfeiture provision the Court examines today is unique to Michigan law. By contrast, the UPC provides that only those spouses who formally undergo a divorce or a termination of marital property rights are excluded from the surviving-spouse intestate share. UPC § 2-802 (2010). See also UPC § 2-802 (2010), comment (explaining that "[a]lthough some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive legal act to bar the surviving spouse").

[9] See 1939 PA 288, § 163 (providing, in part, that the surviving spouse would split the decedent's estate with the decedent's parents if the decedent had no children; if the decedent had children, then the surviving spouse would take a third of the decedent's estate and the children would be given the balance (or, if the decedent only had one child, the child and the surviving spouse would split the estate equally)).

[10] 1978 PA 642, § 105. EPIC has been amended to allow the surviving spouse to take the first $150,000, rather than $60,000, before splitting the balance of the estate. MCL 700.2102.

adopted this increased share, it adopted the forfeiture provision.

To determine the meaning of "willfully absent," we must turn to the dictionary.[11] *Webster's New Twentieth Century Dictionary* (2d unabridged ed) defines the adjective "absent" as "not present; not in company; away."[12] Accordingly, when a spouse is "absent" he or she is "not present" or "away," making the critical aspect of "absent" the lack of physical presence.[13]

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[11] See, e.g., *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) ("Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning.") (citations omitted). And since we are dealing with a provision of a statute that has not been changed since its original enactment, I believe we should use dictionaries from the time the provision was first enacted. See generally *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 563 n 58; 886 NW2d 113 (2016). In any case, there are no meaningful differences between these definitions and those provided by more modern dictionaries, as will be shown below.

[12] *Webster's New Twentieth Century Dictionary* (2d unabridged ed).

[13] This idea—that physical presence is the critical aspect of "absent"—comports with the primary historical sense of the word, see Slotkin, *Absent 'Without': Adjective, Participle, or Preposition*, 60 American Speech 222, 222 (Autumn, 1985) ("Historically, *absent* has functioned primarily as an adjective synonymous with *missing* or, with stress shift, a reflexive transitive verb with the meaning of 'be away'."), and a definition reflecting this sense of the word is present in every dictionary I was able to locate. See *The Random House Dictionary of the English Language* (unabridged ed, 1969) ("1. not in a certain place at a given time; away; missing; not present. 2. lacking; nonexistent."); *Webster's New Collegiate Dictionary* (1974) ("1. not present or attending : MISSING. 2. not existing : LACKING . . . ."); *The Oxford English Dictionary* (2d ed) ("1. being away, withdrawn from, or not present (at a place). 2. of things: withdrawn; wanting; not existing."); *Merriam-Webster's Collegiate Dictionary* (11th ed) ("1: not present or attending : MISSING 2: not existing : LACKING . . . ."); *The American Heritage Dictionary of the English Language* (new college ed, 1981) ("1. Missing or not present. 2. Not existent; lacking."); *Random House Webster's College Dictionary* (2001) ("not in a certain place at a given time; away; missing; not present . . . .").

As the majority recognizes, the term "absent" is also defined as "heedless; inattentive to persons present or to subjects of conversation in company."[14] This may be true, but when a word has more than one definition, the context determines the sense in which the Legislature used the word.[15] Considered properly, the definition on which the majority relies does not fit the context of this provision, which requires a spouse to be "absent" for a year or more.[16] It would make little sense to say—or think the Legislature was requiring—that a spouse was "preoccupied" or "lost in thought" for a year or more, much less that the person remained in such a state "willfully." And combining this definition with "physical absence" only makes matters worse. Now the spouse must be both physically absent and "lost in thought"? In short, the definition of absent on which the majority purports to rely has no workable meaning in the statutory context. Instead, being *physically* absent is clearly "the most contextually appropriate" definition.[17]

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[14] *Webster's New Twentieth Century Dictionary* (2d unabridged ed).

[15] See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 70 ("Most common English words have a number of dictionary definitions, some of them quite abstruse and rarely intended. One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise."). Therefore, when interpreting a statutory term, we typically choose and apply the most contextually appropriate definition. *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 513; 821 NW2d 117 (2012) (" 'Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.' ") (citation omitted).

[16] See note 26 of this opinion and accompanying text.

[17] See *Reading Law*, p 70 and note 15 of this opinion. Moreover, as the Court of Appeals recognized in *In re Peterson Estate*, 315 Mich App 423, 432; 889 NW2d 753 (2016), the definition of "absent" focusing on emotional inattentiveness does not fit in the present context for another

Furthermore, no matter how hard one looks, it is clear that the definition the majority relies on—"inattentiveness"—does not even yield the majority's notion of "complete . . . emotional absence."[18] Rather, this definition of "absent" refers to a state of mental distraction, not emotional absence.[19] The dictionaries phrase this definition in slightly different ways: "not attentive; preoccupied; absent-minded,"[20] "inattentive, preoccupied,"[21] "lost in thought: not attentive,"[22] "not attentive; preoccupied; absent-minded,"[23] "[a]bsent-minded; paying no attention to, and receiving no im-

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reason: "Here, the statute refers to someone who 'did' certain acts, including being 'willfully absent,' deserting, or willfully neglecting or refusing to support the decedent spouse for '1 year or more' before the deceased spouse's death. See MCL 700.2801(2)(e). This context suggests physical separation."

Finally, in addition to being inapt, I agree with the Court of Appeals' conclusion in *In re Harris Estate*, 151 Mich App 780, 785; 391 NW2d 487 (1986), that this definition, focusing on emotions, is unworkable: "[s]ince all of us are subject to inattentiveness, whether willful or not, at some time or another, such an interpretation of absent would render the statute so broad in application as to put in jeopardy every surviving spouse's right to election under the Revised Probate Code." Moreover, how could courts even begin to measure inattentiveness? That seems like a question better left to a psychologist than a judge. And, even if it could be measured, how inattentive must one be? I fail to see how this alternative definition could be meaningfully applied.

[18] And notably, neither party in this case, nor the Court of Appeals, asserted that one can read "emotional absence" into the definition of "inattentive" and thereby incorporate it into "willfully absent," as the majority does here. This innovation, it would seem, is the majority's alone.

[19] This is true of the other definitions of "inattentiveness" discussed below. See note 26 of this opinion (defining "inattentive").

[20] *The Random House Dictionary of the English Language* (unabridged ed, 1969).

[21] *Webster's New Collegiate Dictionary* (1974).

[22] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[23] *Random House Webster's College Dictionary* (2001).

pression from, present objects or events."[24] But none of these permutations involves an emotional aspect. Indeed, one could be inattentive to many different things—e.g., hygiene, finances, responding promptly—without being emotionally absent. And it would seem that one could be "emotionally absent" (as the majority uses that term) without being inattentive in any of these ways, or in general. Despite the majority's attempts to tease a connotation of emotional absence out of "inattentiveness," it is clear that the dictionary definitions simply will not cooperate.

Even so, the majority does not cite, and I have been unable to find, a dictionary that combines emotional inattentiveness and physical absence into a single definition, as the majority does here. Instead, as the majority acknowledges,[25] these definitions of "absent" are listed as separate alternatives: there is no definition that requires both physical and emotional absence.[26] By knitting together these disparate definitions, the majority creates its own definition,

[24] *The Oxford English Dictionary* (2d ed).

[25] See *ante* at 10.

[26] Nor, logically, could there be since one definition requires a person to be *physically absent*, i.e., "not present; not in company; away," while the other, as it pertains to human interaction, requires in its ordinary usage a person to be *physically present*, i.e., "inattentive to persons *present* or to subjects of conversation *in company*." *Webster's New Twentieth Century Dictionary* (2d unabridged ed) (emphasis added). See also *Webster's New Twentieth Century Dictionary* (2d unabridged ed) (defining "inattentive" as "not attentive; heedless; careless; negligent; as, an *inattentive* spectator or hearer"). This makes sense—we do not think of someone who is physically absent as also not fixing or applying the mind steadily. Instead, "inattentive" refers to someone who is physically present but "showing a lack of attention." See *The American Heritage Dictionary of the English Language* (new college ed, 1981), p 663. These two definitions of "absent"—physically missing and mentally distracted—thus, are not complementary aspects of a singular definition; they are two logically inconsistent alternative definitions, of which

effectively choosing "all of the above," instead of choosing the contextually appropriate meaning.[27]

Next, we must consider whether the statute has an intent requirement. As an initial matter, I am in agreement with the majority (and the Court of Appeals in *In re Peterson*) when it states that the statute does not require proof of an intent to abandon one's marital rights before an individual can be barred from inheriting under the provision.[28] But the statute does re-

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we must "choose and apply the most contextually appropriate." See *Reading Law*, p 70, and note 15 of this opinion.

[27] The majority is conflicted regarding how to treat the dictionary: is it the "first point of reference," *ante* at 10, or simply "one data point . . . [that] guides our analysis, but it does not by itself settle it," *ante* at 21? The latter characterization, it seems to me, is just another way of saying that the majority does not like the answer that the dictionary provides. There are many ways that "an uncritical approach to dictionaries can mislead judges . . . ." *Reading Law*, p 415 (discussing the use of "unreliable" and "threadbare" definitions). Not surprisingly, definition-shopping is high on the list. See *id*. at 418 (stating, as a "primary principle[] . . . in using dictionaries," that "[b]ecause common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense"). Instead of locating the aptest definition in this context, the majority rewrites the statute by creating a third definition more to its liking—one that is unknown to any dictionary.

[28] See *ante* at 24-25. I do not agree with the majority, however, when it seems to say the complete opposite. See *ante* at 16 ("These provisions all describe a situation in which, in effect, a spouse has initiated conduct that results in the complete dissolution of his or her marriage, either in fact or in practice."); *ante* at 17 ("[W]illful absence requires consideration of the totality of the circumstances. It presents a factual question for the trial court to answer: whether a spouse's complete absence brought about a practical end to the marriage."); *ante* at 17 n 9 ("[T]he trial court should ascertain whether that spouse has been *completely* absent from the other, both emotionally and physically."); *ante* at 21 (defining "absent" as "complete physical and emotional absence" and stating that the statutory scheme "contemplates that one only loses his or her status as a 'surviving spouse' if he or she takes action that is akin to a complete repudiation of the marriage"); *ante* at 27 ("[C]ourts should evaluate whether complete physical and emotional absence existed, resulting in

quire that the absence be "willful." In ordinary use, "willful" is defined as "said or done deliberately or intentionally" or "following one's own will unreasoningly; obstinate; stubborn."[29] Linguistically, it does not make much sense to think of a person's absence from their spouse under EPIC in terms of whether the absence was "deliberate" or "intentional." No reasonable person would contend that an unintentional or involuntary separation—such as one resulting from a long-term medical condition, or being stranded on a deserted island—was what the Legislature was guarding against when it enacted this provision. To be "willful," then, as that term is commonly understood in the context of human interaction, is to make a decision on one's own, without regard to others.[30] A decision made with the consent of the other spouse is not a willful decision—that is, it is not a decision made "following one's own will unreasoningly."[31] Therefore,

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an end to the marriage for practical purposes."). Under the majority's view, it seems that the spouse must initiate conduct that he or she knows would result in the termination of the marriage, and the spouse must be successful in doing so. That sounds an awful lot like intent. The majority's interpretation twists like a pretzel here as well.

Finally, it is worth noting that the majority's newfangled legal concept of a "practical" end to a marriage is vague and unsupported. It appears that the majority believes a marriage effectively ends, for these purposes, when there is a "complete" physical and emotional absence. Why must the absence be "complete"? And what can it possibly mean to be "completely" emotionally absent from someone? How will a court possibly make this determination?

[29] *Webster's New Twentieth Century Dictionary* (2d unabridged ed).

[30] See *Krohn*, 490 Mich at 156-157. The majority fails to recognize this alternative definition of "willful" or provide any rationale for its decision to give that term such a strained meaning in this context.

[31] See also *The Oxford English Dictionary* (2d ed) (defining "willful" as "[a]sserting or disposed to assert one's own will against persuasion, instruction, or command; governed by will without regard to reason; determined to take one's own way; obstinately self-willed or perverse").

by using the phrase "*willfully* absent," the statute refers to a spouse who is physically absent as a result of a unilateral decision by that spouse.[32] By contrast, spouses who live apart by mutual choice would be considered surviving spouses under the forfeiture provision because the absent spouse did not make a unilateral decision to be absent.[33]

The majority asserts that without an emotional-absence requirement, the "willfully absent" provision would be rendered a nullity by the desertion provision.[34] Although we concede that in many cases there is overlap between these two provisions, that is not always the case. Because "desertion" requires that

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Although we disagree on which definition applies, I agree with the majority that it does not matter whether the term "willful" is a term of art because the lay and legal dictionaries contain similar sets of definitions. See *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 621 n 62; 886 NW2d 135 (2016) ("If the definitions are the same in both a lay dictionary and legal dictionary, it is unnecessary to determine whether the phrase is a term of art, and it does not matter to which type of dictionary this Court resorts."). The legal dictionary at the time of the statute's drafting defined "willful" as having a unilateral component: "[i]ntractable; having a headstrong disposition to act by the rule of contradiction." *Black's Law Dictionary* (revised 4th ed).

[32] While unnecessary to my interpretation, it is worth noting that my view is also consistent with the Reporter's Comments to RPC § 290, the statute from which MCL 700.2801(2)(e) was derived. The Reporter's Comments explain that "[MCL 700.2801(2)(e)] describes unilateral actions that are not approved or condoned by the decedent spouse before death." Martin & Harder, Estates and Protected Individuals Code with Reporters' Commentary (ICLE, 2018), p 154.

[33] Many divorce statutes that predated no-fault divorce legislation explained "desertion" by reference to a "willful absence." And one treatise from 1873 explains that, like our reading, to be granted a divorce due to "willful absence" a plaintiff must not have agreed to the absence—"because, if the plaintiff had consented to the absence, he would be barred on the ground of connivance[.]" 1 Bishop, *Commentaries on the Law of Marriage and Divorce* (5th ed), § 775, p 664.

[34] See *ante* at 13. As discussed above, in addition to excluding a "willfully absent" spouse, MCL 700.2801(2)(e) also excludes

someone have the intent to stay away, not every spouse who is "willfully absent" will also be guilty of "desertion."[35] Conversely, while a spouse who has "deserted" the other will often be "willfully absent," there may be exceptions. For example, in the divorce context, our Court has recognized that a spouse may be guilty of

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> [a]n individual who . . . for 1 year or more before the death of the deceased person:
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> * * *
>
> (*ii*) Deserted the decedent spouse.

[35] The word "desertion," whether read as a legal term of art or according to its ordinary use, includes as an element the intent not only to be physically absent, but to permanently abandon. See *Black's Law Dictionary* (10th ed) ("The willful and unjustified abandonment of a person's duties or obligations."). *Black's* explains further that, "[i]n family law, the five elements of spousal desertion are (1) a cessation of cohabitation, (2) the lapse of a statutory period, (3) an intention to abandon, (4) a lack of consent from the abandoned spouse, and (5) a lack of spousal misconduct that might justify the abandonment." *Id*. "Abandon," in turn, is defined as "[t]o desert or go away from permanently." See also *Webster's New Twentieth Century Dictionary* (2d unabridged ed) (defining "desert" as "to forsake; to leave in the lurch; to abandon; to quit with a view not to return to"). Cf. *The Random House Dictionary of the English Language* (1966) (defining "desert" as "to leave (a person, place, etc.) without intending to return, esp. in violation of a duty, promise, or the like; abandon; forsake"). This reflects our treatment of the term "desertion" in the divorce context, in which we held that desertion could not be found when the parties were considering whether to resume their status as husband and wife, i.e., when a spouse had not yet demonstrated an intent to permanently depart from the marriage. See *Rudd v Rudd*, 33 Mich 101, 102 (1875) (holding that proof the parties considered living together again "goes to negative the proposition that either party considered that matrimonial cohabitation was not to be resumed or continued," and for that reason, a bill for divorce based on desertion could not be maintained); see also *Rose v Rose*, 50 Mich 92, 92; 14 NW 711 (1883) ("To make out a case for the dissolution of marriage on this ground [i.e., desertion] there must be satisfactory proof of three things: *First*, cessation of cohabitation ; *second*, an intent in the mind of the defendant to desert [i.e., leave permanently] ; and, *third*, that the separation was against the will of the complainant.").

desertion, not by leaving a spouse, but by mental or physical abuse that drives the other spouse away.[36] Under my reading, then, both statutory provisions—"willfully absent" and "desertion"—do independent work. For these reasons, I do not agree with the majority's statement that reading "absent" as meaning only physically absent renders the provision surplusage.

Lastly, instead of looking to the text and dictionary definitions, the majority divines its "complete" physical and emotional absence requirement through its interpretation of the statutory context, i.e., other provisions precluding someone from "surviving spouse" status. But all the majority really does is import perceived requirements from these other provisions into the definition of "willfully absent."[37] Moreover, the majority fails entirely to grapple with other surrounding provisions, such as MCL 700.2801(2)(d) (stating that a

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[36] See *Warner v Warner*, 54 Mich 492, 494-495; 20 NW 557 (1884) ("[A husband] as completely commits the crime of desertion when by his cruel conversation and conduct, he compels [his wife] for safety to leave him and his home, as when he willfully and without cause leaves and abandons her."); see also Bishop, § 791 (noting that a spouse can desert his or her spouse by engaging in "ill conduct" with the intent that the other spouse leave).

[37] For example, the majority notes that MCL 700.2801(e)(*ii*) and (*iii*) each include requirements that "involve intentional acts that bring about a situation of divorce in practice . . . ." *Ante* at 15. Putting aside whether that is correct (and I doubt that it is), the majority does not grapple seriously with whether that same requirement pertains to MCL 700.2801(e)(*i*). The majority does not, for example, purport to apply any canon of interpretation, such as the associated-words canon, which holds that words associated by context "should be assigned a permissible meaning that makes them similar." *Reading Law*, p 195. In such cases, the "common quality suggested by a listing should be its most general quality—the least common denominator, so to speak—relevant to the context." *Id*. at 196. The majority's interpretation does not attempt to reflect the "most general quality" of the listed items. I fail to see how the majority's newly conceived "quality" of a complete physical

surviving spouse does not include "[a]n individual who, at the time of the decedent's death, is living in a bigamous relationship with another individual"), which target actions that do not necessarily reflect an intent to end the marriage. The majority's attempt to justify its departure from the plain language of MCL 700.2801(2)(e)(*i*) based upon the statutory context in which it appears is simply not persuasive.

In sum, I conclude that the phrase "willfully absent" in the forfeiture provision, MCL 700.2801(2)(e)(*i*), refers to a person who is physically absent from the decedent spouse as a result of his or her unilateral decision. I also agree with the majority that the record in this case is sparse and believe that the majority's recitation of the few facts we know is accurate. Therefore, I would remand this case to the trial court so that it may determine in the first instance whether Maggie was physically absent as a result of her unilateral decision.[38]

Because I believe that the majority's interpretation is not in accordance with a plain-language reading of the statute, I respectfully dissent.

MCCORMACK and BERNSTEIN, JJ., concurred with VIVIANO, J.

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and emotional absence leading to de facto divorce could have possibly been the "most general quality" the Legislature meant to capture with this list.

[38] On remand, I would direct the trial court to consider the length of time apart, the fact that James consented to a support order providing Maggie and their children with financial assistance, the statements in the 2010 complaint that Maggie and James filed in their joint suit against General Motors, and any other evidence bearing on this question.

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION v SECRETARY OF STATE

Docket No. 157925. Argued July 18, 2018 (Calendar No. 1). Decided July 31, 2018.

Citizens Protecting Michigan's Constitution (CPMC), Joseph Spyke, and Jeanne Daunt sought a writ of mandamus in the Court of Appeals ordering that defendants, the Secretary of State and the Board of State Canvassers (the Board), reject an initiative petition filed by intervening defendant Voters Not Politicians (VNP) to place on the November 2018 general election ballot a proposed amendment of Article 4, § 6 of the 1963 Michigan Constitution that would create an independent citizens commission to oversee legislative redistricting. Article 4, § 6 of the 1963 Michigan Constitution established a commission to regulate legislative redistricting, but the Supreme Court subsequently declared that provision was not severable from apportionment standards that were unconstitutional; accordingly, in more recent years, the Legislature has overseen redistricting. VNP's proposal sought to bring the commission in line with constitutional requirements and revive its authority to set redistricting plans for the state house, state senate, and federal congressional districts. VNP gathered sufficient signatures for the petition to be placed on the ballot, but before the Board could certify the petition, plaintiffs sought a writ of mandamus directing the Secretary of State and the Board to reject the VNP proposal, arguing that the proposal was not an "amendment" of the Constitution that could be proposed by petition under Article 12, § 2 of the 1963 Michigan Constitution but rather was a "general revision" of the Constitution that could only be enacted through a constitutional convention under Article 12, § 3. VNP and other parties moved to intervene as defendants and to file a cross-claim seeking a writ of mandamus to require that the proposal be placed on the ballot. The Court of Appeals, CAVANAGH, P.J., and K. F. KELLY and FORT HOOD, JJ., rejected plaintiffs' requested relief and granted the relief sought by intervening defendants, ordering the Secretary of State and the Board to take all necessary measures to place the proposal on the ballot. 324 Mich App 561 (2018). The Court of Appeals held that the proposal was an

amendment rather than a revision because no fundamental government operations would be altered: the proposal would continue the redistricting commission, with modifications, already in the Constitution; the proposal involved a single, narrow focus—the independent citizens redistricting commission; and the Supreme Court would retain control over challenges to redistricting plans. CPMC sought leave to appeal in the Supreme Court and requested a stay of proceedings so that the Board would not certify the proposal while the case remained pending. The Supreme Court denied the motion for a stay but granted leave to appeal to consider whether the proposal was eligible for placement on the ballot as a voter-initiated constitutional amendment under Article 12, § 2, or whether it was a general revision of the Constitution and therefore ineligible for placement on the ballot. 502 Mich 907 (2018).

In an opinion by Justice VIVIANO, joined by Justices MCCORMACK, BERNSTEIN, and CLEMENT, the Supreme Court *held*:

A voter-initiated amendment under Const 1963, art 12, § 2 is permissible if it proposes changes that do not significantly alter or abolish the form or structure of the government in a manner equivalent to creating a new constitution. Because VNP's proposal would leave the form and structure of the government essentially as it was envisioned in the 1963 Constitution, it was not equivalent to a new constitution and was therefore a permissible amendment under Article 12, § 2. Accordingly, the judgment of the Court of Appeals was affirmed.

1. Const 1963, art 1, § 1 provides that all political power is inherent in the people. The people have chosen to retain for themselves, in Const 1963, art 12, § 2, the power to initiate by petition proposed constitutional amendments that, if various requirements are met, will be placed on the ballot and voted on at an election. Specifically, Const 1963, art 12, § 2 requires every petition to include the full text of the proposed amendment and to be signed by registered electors of the state equal in number to at least 10% of the total votes cast for Governor in the most recent general gubernatorial election. Once the person authorized by law to receive the petition determines that the petition signatures were valid and sufficient, the proposed amendment is placed on the ballot. The Constitution also provides, in Const 1963, art 12, § 3, that the question of a general revision of the Constitution shall be submitted to the electors of the state every 16 years and at such times as may be provided by law.

2. In construing a constitutional provision, the objective is to determine the original meaning of the text to the people at the

time of ratification using the rule of common understanding. To help discover the common understanding, constitutional convention debates and the Address to the People, though not controlling, are relevant. The pertinent definitions of "amendment" in dictionaries from the time Article 12, § 2 and its predecessor article in the 1908 Constitution were ratified did not directly address the breadth of the change that could be made by amendment or provide any substantive limitations on amendments.

3. The Michigan caselaw construing the meaning of the term "amendment" in Article 12, § 2 was not controlling. In *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273 (2008), aff'd in result only 482 Mich 960 (2008), the Court of Appeals held that, in order to determine whether a proposal effects a "general revision" of the Constitution rather than an amendment of it, the Court must consider both the quantitative nature and the qualitative nature of the proposed changes, specifically taking into account not only the number of proposed changes or whether a wholly new constitution is being offered but also the scope of the proposed changes and the degree to which those changes would interfere with or modify the operation of government. In reaching this conclusion, the Court relied, in part, on *Kelly v Laing*, 259 Mich 212 (1932), and *Sch Dist of City of Pontiac v City of Pontiac*, 262 Mich 338 (1933), and also on cases from other jurisdictions. However, *Laing* was clearly distinguishable because, while it addressed the distinction between a "revision" and an "amendment," it did so in the context of a city charter under the Home Rule City Act, MCL 117.1 *et seq*., and that discussion was unnecessary to resolving the case, and *Pontiac Sch Dist* summarily rejected the argument that a proposed amendment amounted to a revision without any discussion of the text of the governing constitutional provision or citation of any authority. Notably, the distinction between an amendment and a revision was contained only in the parties' arguments to the Court; speaking for itself, the *Pontiac* Court did not actually embrace a dichotomy between amendments and revisions but simply concluded that the proposal was not so dramatic a change as to "render it other than an amendment." At most, *Pontiac* suggested that there might be undefined limitations on what could be achieved by an amendment. In *Citizens*, the Michigan Supreme Court had an opportunity to resolve the case under the amendment/revision dichotomy but declined to do so, affirming the result only and fracturing on the reasoning. The Court of Appeals again addressed this issue in *Protect Our Jobs v Bd of State Canvassers*, unpublished per curiam opinion of the Court of

Appeals, issued August 27, 2012 (Docket No. 311828), which involved a CPMC challenge to a proposal on the same grounds it asserted in *Citizens* and in this case: that the proposal was a general revision of the Constitution under Article 12, § 3. The Court of Appeals rejected CPMC's challenge, using the "qualitative and quantitative" standard from *Citizens* and concluding that although the proposal might affect various provisions and statutes, it was limited to a single subject matter and changed only two sections of the Constitution, whereas the proposal in *Citizens* sought to replace vast portions of the Constitution and massively modify the structure and operation of Michigan's government. However, on appeal, the Supreme Court did not order briefing on the issue and did not address it.

4. The predecessor of Const 1963, art 12, § 2, which was ratified as Const 1908, art 17, § 2, initially gave the Legislature a veto over voter-initiated amendments before the election at which the proposal would appear on the ballot and allowed the Legislature to submit alternative or substitute amendments. However, the legislative veto was deleted by amendment in 1913. That change, which removed the clearest and most significant substantive check on the petition power, counseled against finding atextual limitations on voter-initiated amendments when construing Const 1963, art 12, § 2. The critical limitation in Const 1963, art 12, § 2, considering the amount of discussion it prompted at the 1961–1962 constitutional convention, was instead the procedural requirement of obtaining a certain number of signatures. A proposal at the convention that would have made it progressively easier to obtain enough signatures as the population increased was struck after a delegate argued that the voter-initiated amendments should not be too easy to accomplish because amendments, unlike statutory matter, should be important enough to merit inclusion in a constitution. Thus, the convention decided to keep voter-initiated amendments difficult because amendments, like the Constitution itself, were intended to deal with serious matters. Accordingly, the convention imposed what it viewed as the clearest and most stringent limitation on initiative amendments: a signature requirement.

5. The relevant substantive limitation on the scope of voter-initiated amendments arises from the text of Article 12, § 2 when read together with Article 12, § 3. By adopting these two different procedures for altering the Constitution, the framers intended that the mechanisms be different in some regard. The result of a constitutional convention called to consider a "general revision" under Article 12, § 3 is a proposed constitution or amendments

adopted by the convention and proposed to the electors. By contrast, if approved, a voter-initiated amendment under Article 12, § 2 becomes part of the Constitution and abrogates or amends existing provisions of the Constitution. Consequently, an amendment does not replace a constitution in full, but simply adds to or abrogates specific provisions in an existing constitution. The fact that only the convention has the power to propose a constitution implies that an initiative amendment cannot do so, and because this limitation would be meaningless if it only required a new constitution to be labeled as an amendment, it follows that an initiative amendment cannot propose changes that are tantamount to a new constitution. The phrase "general revision" supports this dichotomy between amendments and new constitutions. "General" means "dealing with all or the overall, universal aspects of the subject under consideration," and "revision" is relevantly defined as "the act or work of revising," which is how the term was characterized in *Laing* and how it was described at the 1908 constitutional convention. The "revision" is simply the process for reconsidering the Constitution as a whole; it is not, as some Court of Appeals opinions suggest, a particular document or proposed change. Accordingly, the distinction between the Article 12, § 3 convention process and the Article 12, § 2 amendment process was that the former could produce a proposed constitution, while the latter was limited to proposing less sweeping changes.

6. In determining whether a voter-initiated amendment is equivalent to a new constitution, the number of changes is not dispositive, as even a limited number of changes can have the effect of creating a new constitution. The most basic functions of a constitution are to create the form and structure of government, define and limit the powers of government, and provide for the protection of rights and liberties. These are the basic threads of a constitution, and when they are removed, replaced, or radically rewoven, the whole tapestry of the constitution may change. Therefore, changes that significantly alter or abolish the form or structure of our government, in a manner equivalent to creating a new constitution, are not amendments under Article 12, § 2. Contrary to the suggestion in *Pontiac Sch Dist*, it is not necessarily the impact on the operations of government that matters. Further, a change that recalibrates the relative power of the branches of government—such as limiting or taking away a specific power from one branch—is not, absent a significant effect on the structure of government, a change tantamount to a new constitution.

7. To determine whether VNP was proposing changes that would significantly alter or abolish the form or structure of our government in a way that is tantamount to creating a new constitution, it was necessary to examine Michigan law on redistricting and apportionment. Michigan's first three Constitutions gave the Legislature authority to redistrict. Because the Legislature did not always carry out this responsibility, two competing voter-initiated amendments were placed on the November 1952 ballot. One was approved, which wrote directly into the Constitution the then-existing alignment of seats in the Senate provided for in the 1952 amendment, added 10 seats to the House, and conferred upon the Board the obligation to draw new house districts if the Legislature failed to act. When the 1963 Constitution was ratified, it laid out a different framework for reapportionment and redistricting, under which the members of the Legislature were to be elected according to the districts in which they resided. The Constitution set forth apportionment factors and rules for individual districts, which were to be redrawn after each federal census in accordance with formulas that considered land area and population. The 1963 Constitution created a bipartisan commission on legislative apportionment to draw the relevant district lines, with the Secretary of State being required to furnish all necessary technical services and the Legislature being required to appropriate funds to enable the commission to carry out its activities. If the commission could not agree on a plan, commissioners could submit plans to the Supreme Court, which was required to determine which plan complied most accurately with the constitutional requirements and direct that the plan be adopted. Soon after the 1963 Constitution was ratified, the United States Supreme Court held in *Reynolds v Sims*, 377 US 533 (1964), that the seats in both houses of a bicameral state legislature must be apportioned on a population basis and that geographical considerations could no longer play a role in apportionment if they produced population deviations between the districts, and it invalidated Michigan's apportionment rules shortly thereafter. As a result, the Michigan Supreme Court ordered the commission to adopt a new plan for redistricting and apportionment that complied with *Reynolds*. After several instances in which the commission failed to reach an agreement and required the Michigan Supreme Court's intervention, the Supreme Court ultimately held in 1982 that the commission was not severable from the provisions that had been declared unconstitutional, stating that changing how legislators are chosen was a decision of enormous importance that the people should make and suggesting that the people could do so by

initiating a constitutional amendment. Because the initiative process was time-consuming and a plan was needed in the meantime, the Supreme Court appointed an individual to oversee the drawing of a redistricting and apportionment plan, but it stressed that this plan was merely a stopgap until the people or their representatives in the other two branches of government acted. It was not until 1996 that the Legislature codified apportionment standards and committed itself to drawing districts in the future. Thus, the last time the voters had direct input on this issue, they opted for apportionment and redistricting to be conducted by a commission, and the Legislature now exercises a power that the Constitution of 1963 expressly denied to it—to draw legislative districts—because the Constitution has never been amended to modify the unconstitutional provisions concerning apportionment and redistricting.

8. VNP's proposal would not significantly alter or abolish the form or structure of government in a manner that is tantamount to creating a new constitution. The VNP amendment would eliminate unconstitutional provisions that have remained in the Constitution and replace them with standards that reflect many of the same principles that took the place of those provisions, including adhering to federal law, requiring contiguous districts, respecting municipal boundaries, and seeking reasonable compactness. While the proposal also contained new items, such as considerations of partisan fairness, VNP's proposed standards would constitute neither a revolution in redistricting nor a transformation of Michigan's form or structure of government. Although the VNP proposal would affect the powers of all three branches of government by adding limiting language to the vesting clauses of each branch, these limitations were the result of VNP's attempt to harmonize its changes with the rest of the Constitution, and they would only place the proposal in jeopardy if the changes were equivalent to the creation of a new constitution. The present Constitution does not accord the Legislature any role in the redistricting or apportionment process; instead, as in VNP's proposal, a commission is placed in charge, and the commissions are materially similar. VNP's proposal seeks to ensure that the membership strikes a partisan balance and gives the Legislature a formal role in this process, while it had no such role in the 1963 Constitution's commission, but this slightly increased level of participation by the Legislature would not come at the expense of either of the other two branches of government. Although the Legislature has established the standards and framework for redistricting and drafted the plans since 1996, that role was a deviation from what the voters chose when they

ratified the 1963 Constitution and was solely due to a judicial remedy that was crafted when the unconstitutional apportionment standards the commission was directed to implement were held not to be severable from the commission itself. The executive branch would not be significantly affected by the proposal, which only slightly expands the Secretary of State's responsibilities. Any additional powers the executive currently has in relation to redistricting flow not from the Constitution but from that same judicial remedy. VNP's proposal would only modestly change the judicial branch's role in the redistricting process. The conclusion that VNP's proposal leaves the form and structure of the government essentially as it was envisioned in the 1963 Constitution is consistent with the expectations of key members of the 1961–1962 constitutional convention, the Michigan Supreme Court's suggestion in 1982 that Michigan's apportionment system could be addressed through an amendment to the Constitution initiated by the people, and the history of amendments to Michigan's Constitution, one of which expressly stripped the Legislature of the power to redistrict in certain circumstances and gave it to an agency in the executive branch. Further, other states have created independent redistricting commissions through voter-initiated amendments, and proposals to create such commissions have appeared on ballots through the initiative process numerous times in multiple states. Similarly, citizens in several states have employed initiatives to accomplish redistricting. Also persuasive was *Bess v Ulmer*, 985 P2d 979 (Alas, 1999), in which the Alaska Supreme Court held that a proposed amendment before the voters that would remove the reapportionment power from the executive branch, where the state's constitution had placed it, and transfer it to a "neutral body" was an amendment rather than a revision. The framers of Michigan's 1963 Constitution did not assign the apportionment power to any elected body, and so the effect of the changes here would be even less significant than those in *Bess*. Thus, the conclusion that VNP's proposal was a permissible voter-initiated amendment reflected the constitutional text, Michigan's historical experience, logic, and the wisdom of other states.

9. VNP's proposal did not amount to an abrogation under Const 1963, art 12, § 2 by requiring commission members to take an oath that is prohibited under the Oath Clause, Const 1963, art 11, § 1. In *Tedrow v McNary*, 270 Mich 332 (1935), this Court upheld a requirement that candidates for a certain public office file an affidavit or other evidence of their educational qualifications. Because the VNP proposal simply required candidates to attest to their qualifications for a position on the commission—a

requirement *Tedrow* allowed—the proposal did not abrogate the Oath Clause by rendering it wholly inoperative.

Affirmed.

Chief Justice MARKMAN, joined by Justices ZAHRA and WILDER, dissenting, would have held that the VNP proposal constituted a general revision of the Constitution and thus was eligible for placement on the ballot only by the convention process of Const 1963, art 12, § 3. The people have made it reasonably clear that while ultimately they do possess the authority to restructure their own charter of government, as to the most fundamentally redefining of these changes, this restructuring will be done only after reflective and deliberative processes of decision-making. And Chief Justice MARKMAN was persuaded that the people would find fundamentally redefining a restructuring of their Constitution that deprived them and their chosen representatives of any role in the foundational process of our system of self-government: the process by which election districts are established, citizens are joined together or separated by political boundaries, and the building blocks of our governing institutions are determined. Inserted in its place by the VNP proposal would be the governance of 13 randomly selected people entirely lacking in any democratic or electoral relationship with the other 10 million people of this state or their elected representatives. In the end, the people must be allowed to do as they see fit; they can diminish the realm of governance of their representatives (and substitute in its place an "independent" and unaccountable commission) and they can dilute the relationship between themselves and their representatives, but the people, as they have spoken through their Constitution, have also insisted that, before a change of this magnitude takes place, a serious and considered public conversation must first take place, affording opportunities for sustained and focused debate, give-and-take, compromise, and modification. Furthermore, references to the fact that the commission is to be "independent" obscure the fundamental change that the proposed measure would make to the people's Constitution; the great value of our Constitution is not the "independence" of public bodies but rather the separation of powers and the checks and balances that define relationships between public bodies and thereby limit and constrain their authority. While the VNP commission would indeed be "independent," most conspicuously, it would be "independent" of the people's representatives in the Legislature, independent of the people, and independent of the processes of self-government, especially the processes by which the people, in whose name both VNP and the majority purport to speak, exert

their impact upon the "foundational" process of redistricting. Our constitutional heritage is poorly described by advocates of this proposal as one predicated upon the "independence" of public bodies; it is far better described as predicated upon the exercise of public authority that is limited, separated, subject to appropriate checks and balances, and accountable to the citizenry. The proposed new commission is grounded upon none of these. Whatever its merits, the creation of this commission would effect "fundamental" change upon both our constitutional charter and the system of government operating under this charter. It thus clearly warrants the kind of careful deliberation best afforded by the processes of constitutional "revision" set forth in Article 12, § 3 of this state's Constitution. For at least the past 85 years in Michigan, governing law concerning direct constitutional change has recognized that alternative constitutional procedures exist for instituting direct constitutional change and that determining which of these procedures is to be used in a particular instance requires an assessment of the qualitative nature of the proposed change, i.e., whether the changes would fundamentally alter the nature or operation of our government. Chief Justice MARKMAN disagreed with the majority's standard to the extent the majority held that a proposed change must be tantamount to creating a new constitution in order to be considered something other than an amendment. In this case, the VNP proposal would strike all that is currently in the Constitution regarding redistricting and would create an independent redistricting commission of a character effecting a fundamental change upon both the Constitution and the system of government operating under that Constitution. The Court of Appeals and the majority erred by assessing the nature of the change that would be effected by the VNP proposal by comparing the commission to be established by the VNP with the commission that had been created by the 1963 Constitution but thereafter was struck down. The pertinent question was not whether replacing the commission created by the 1963 Constitution with the VNP commission would fundamentally change the operation of government, but whether removing the power to redistrict from the Legislature and conferring that power onto the VNP commission would fundamentally change the operation of government because the courts were obligated to consider how the government is currently operating in order to make the necessary comparison, not how the government might once have operated, and it currently operates (as it has almost always operated in the history of our state) with the Legislature responsible for redistricting. The VNP proposal would affect the foundational power of government by removing altogether from the legislative branch

authority over redistricting and consolidating that power instead in an independent commission made up of 13 randomly selected individuals who are not in any way chosen by the people, representative of the people, or accountable to the people, thereby effecting a fundamental alteration in the relationship between the people and their representatives. The proposal would also modify the prefatory language of Articles 4, 5, and 6 of the 1963 Constitution pertaining to the legislative, executive, and judicial powers, suggesting that the commission itself is an entirely novel institution that would fundamentally alter the Constitution's separation of powers. Chief Justice MARKMAN therefore would have held that because the VNP proposal, if adopted, would fundamentally change the operation of the government, it was not an amendment that could be properly placed on the ballot by the initiative process of Const 1963, art 12, § 2. Rather, the decision of the Court of Appeals should have been reversed because the VNP proposal constituted a general revision that was only eligible for placement on the ballot through the convention process of Const 1963, art 12, § 3.

Justice WILDER, joined by Justice ZAHRA, dissenting, concurred in full with Chief Justice MARKMAN's dissent but wrote separately to address an alternative basis for rejecting the VNP proposal. Article 12, § 2 of the 1963 Constitution and MCL 168.482(3) both require that ballot proposals that would amend Michigan's Constitution republish any existing constitutional provisions that the proposed amendment would alter or abrogate. Article 4, § 6(2)(A)(III) of the VNP proposal, which is distinct from the qualifications for office listed in Article 4, § 6(1) of the VNP proposal, would require that applicants to the independent citizens redistricting commission attest under oath either that they affiliate or do not affiliate with one of the two major political parties. An applicant's failure to attest under oath regarding his or her political party affiliation would render that applicant ineligible for a position on the commission under VNP proposal, art 4, § 6(2)(D)(I). Because this oath requirement in the VNP proposal would abrogate Article 11, § 1 of the 1963 Constitution, which forbids requiring additional oaths or affirmations as a qualification for public office, VNP was required to republish that provision on its petitions. Strict compliance with the republication requirement was required, and it was uncontested that VNP failed to republish Article 11, § 1. Therefore, an order of mandamus should have issued directing the rejection of the VNP proposal.

1. CONSTITUTIONAL LAW — AMENDMENTS — GENERAL REVISIONS — VOTER-INITIATED BALLOT PROPOSALS.

A voter-initiated ballot proposal that seeks to amend the Michigan Constitution is a permissible amendment under Const 1963, art 12, § 2, rather than a general revision that can only be effected under Const 1963, art 12, § 3, if it does not significantly alter or abolish the form or structure of Michigan government in a manner equivalent to creating a new constitution; the impact on the operations of government is not necessarily what matters in making this determination; a proposed amendment that would recalibrate the relative power of the branches of government is not, absent a significant effect on the structure of government, a change tantamount to a new constitution; and the number of changes to the Constitution that a proposal would make is not dispositive of whether it is an amendment or a general revision.

2. CONSTITUTIONAL LAW — AMENDMENTS.

An amendment adds to or abrogates specific provisions in an existing constitution; it does not replace a constitution in full.

3. CONSTITUTIONAL LAW — GENERAL REVISIONS.

A revision is the process for reconsidering a constitution as a whole; it is not a particular document or proposed change.

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VIVIANO, J. The question in this case is whether the voter-initiated amendment proposed by intervening defendant Voters Not Politicians (VNP) should be placed on the ballot. VNP launched a petition drive to propose an amendment that would reestablish a commission to oversee legislative redistricting. Plaintiffs brought suit to stop the petition from being placed on the ballot, making the now familiar argument that the proposed amendment is actually a "general revision" that can only be enacted through a constitutional convention.

We took this case to determine whether the VNP petition is a constitutionally permissible voter-initiated amendment under Const 1963, art 12, § 2. To answer this question, we must fulfill our Court's most solemn responsibility: to interpret and apply the pertinent provisions of our Constitution. After closely examining the text, structure, and history of the Constitution, we hold that, to be permissible, a voter-initiated amendment must propose changes that do not significantly alter or abolish the form or structure of the government in a manner equivalent to creating a new constitution. We reach this conclusion for the following reasons:

- The text of the relevant constitutional provisions, Const 1963, art 12, §§ 2 and 3, makes it clear that a constitutional convention is required to produce a new constitution. (See pages 71-82 of this opinion.)
- The primary substantive limitation in the text of the predecessor provision to Const 1963, art 12, § 2 originally imposed on voter-initiated amendments was removed more than 100 years ago. (See pages 71-73 of this opinion.)
- Our caselaw on this topic—undeveloped and largely not on point—fails to establish any controlling standard in this area. (See pages 64-70 of this opinion.)

In this case, VNP's amendment does not propose changes creating the equivalent of a new constitution:

- VNP's proposed redistricting commission is materially similar to the commission provided for in our current Constitution, and VNP's proposed redistricting standards are similar to the ones presently used. (See pages 89-94 of this opinion.)
- VNP's proposal does not substantially change the powers of the three branches of government when compared to where the people placed those powers in the 1963 Constitution. (See pages 94-99 of this opinion.)
- Finally, treating VNP's proposal as an amendment accords with the stated expectations of key delegates to the 1961–1962 constitutional convention, statements from this Court on this very topic, and the treatment of this issue by other states. (See pages 100-105 of this opinion.)

Therefore, we affirm the judgment of the Court of Appeals that VNP's proposal is a permissible voter-initiated amendment.

I. FACTS AND PROCEDURAL HISTORY

VNP is a ballot-question committee. It filed with defendant Secretary of State the initiative petition at issue in this case. The initiative proposal would, among other things, amend Const 1963, art 4, § 6, which established a commission to regulate legislative redistricting. The commission prescribed by our present Constitution is inactive because this Court declared that it could not be severed from apportionment standards contained in the Michigan Constitution that had been held to be unconstitutional, as explained further below.[1] After that ruling, this Court oversaw redistricting until the Legislature took control of the process. VNP's proposal would bring Michigan's constitutional redistricting standards in line with federal constitutional requirements and revive the redistricting commission's authority to set redistricting plans for the state house, state senate, and federal congressional districts.

A sufficient number of registered electors signed the petition for it to be placed on the November 2018 general election ballot. Before the Board of State Canvassers could certify the petition for placement on the ballot,[2] plaintiff Citizens Protecting Michigan's Constitution (CPMC), along with other plaintiffs,[3] filed the present complaint for a writ of mandamus directing the Secretary of State and the Board to reject the VNP proposal. CPMC argued that the proposal was not an amendment of the Constitution that could be proposed by petition under Const 1963, art 12, § 2; rather, the

[1] *In re Apportionment of State Legislature—1982*, 413 Mich 96; 321 NW2d 565 (1982).

[2] MCL 168.477.

[3] While multiple plaintiffs appear in the action, for ease of reading we will refer to CPMC alone.

proposal amounted to a "general revision" of the Constitution and could be enacted only through a constitutional convention under Const 1963, art 12, § 3. The Court of Appeals granted the request by VNP and other parties[4] to intervene as defendants and to file a cross-complaint seeking a writ of mandamus requiring the proposal to be placed on the ballot.

In a unanimous published opinion, the Court of Appeals rejected plaintiffs' requested relief and granted the relief sought by intervening defendants, ordering the Secretary of State and the Board "to take all necessary measures to place the proposal on the November 2018 general election ballot."[5] The Court noted that our courts have long distinguished between an "amendment" and a "revision."[6] The former was a narrower concept focusing on specific changes to the Constitution, while the latter was a more comprehensive modification of fundamental government operations.[7] To determine if a particular proposal changed the fundamental nature of the government, the Court of Appeals considered the quantitative and qualitative features of the proposal.[8]

Comparing the present proposal to those addressed in past cases, the Court observed that the proposal

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[4] Again, we will refer only to VNP and not the other parties.

[5] *Citizens Protecting Michigan's Constitution v Secretary of State*, unpublished order of the Court of Appeals, entered June 7, 2018 (Docket No. 343517).

[6] *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 589; 922 NW2d 404 (2018) (*CPMC*).

[7] *Id*. at 590.

[8] *Id*. at 591-592, citing *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 305; 761 NW2d 210 (2008), aff'd in result only 482 Mich 960 (2008). This 2008 Court of Appeals case and its affirming order will be referred to as *Citizens* throughout this opinion.

would continue, with modifications, the redistricting commission already in the Constitution (although not enforced).[9] Also, the proposal "involve[d] a single, narrow focus—the independent citizens redistricting commission."[10] While the proposal reduced this Court's oversight of redistricting plans from the level contemplated by the present Constitution, our Court would nonetheless retain control over challenges to redistricting plans.[11] Regarding quantitative considerations, the Court of Appeals noted the number of words the proposal would add to the Constitution (4,834) and the fact that 11 sections would be changed across 3 articles of the Constitution.[12] None of this, however, was enough to convince the Court that fundamental government operations would be altered. Thus, the proposal was an amendment that could be brought by petition, as it had been.

CPMC sought leave to appeal here and requested a stay of proceedings below so that the Board would not certify the proposal while the case remained pending. We denied the motion for a stay,[13] but we granted leave to appeal to consider "whether the proposal at issue is eligible for placement on the November 2018 general election ballot as a voter-initiated constitutional amendment under Const 1963, art 12, § 2, or whether it is a revision to the Constitution and therefore is ineligible for placement on the ballot."[14]

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[9] *CPMC*, 324 Mich App at 576 & n 21, 594-596.

[10] *Id*. at 595.

[11] *Id*. at 595-596.

[12] *Id*. at 598.

[13] *Citizens Protecting Michigan's Constitution v Secretary of State*, 912 NW2d 181 (2018).

[14] *Citizens Protecting Michigan's Constitution v Secretary of State*, 502 Mich 907 (2018).

II. STANDARD OF REVIEW

A lower court's decision on whether to grant a writ of mandamus is reviewed for an abuse of discretion.[15] To the extent that a request for a writ of mandamus involves questions of law, we review them de novo.[16]

III. ANALYSIS

A. CONSTITUTIONAL INTERPRETATION

Our Constitution is clear that "[a]ll political power is inherent in the people."[17] The people have chosen to retain for themselves, in Const 1963, art 12, § 2, the power to initiate proposed constitutional amendments that, if various requirements are met, will be placed on the ballot and voted on at election time. It has been observed that "there is no more constitutionally significant event than when the wielders of '[a]ll political power' under that document, Const 1963, art 1, § 1, choose to exercise their extraordinary authority to directly approve or disapprove of an amendment thereto. Const 1963, art 12, §§ 1 and 2."[18] In this case, we must determine the scope of the voters' power to initiate amendments.

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[15] See *People ex rel King v Wayne Circuit Judge*, 41 Mich 727; 49 NW 925 (1879).

[16] *Bonner v City of Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014).

[17] Const 1963, art 1, § 1.

[18] *Blank v Dep't of Corrections*, 462 Mich 103, 150; 611 NW2d 530 (2000) (MARKMAN, J., concurring). Indeed, Michigan is one of the leading states when it comes to direct democracy reforms. In addition to retaining the right to amend the Constitution by direct initiative, the people of Michigan have also reserved the power to propose and enact statutes by initiative, Const 1963, art 2, § 9; to reject statutes by referendum, *id.*; and to recall elected officials, Const 1963, art 2, § 8. Michigan is one of only eight states whose people have retained each of these forms of direct democracy. See National Conference of State Legislatures, *Initiative and Referendum States* <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx>

In answering this question, we do not consider whether the proposed amendment at issue represents good or bad public policy.[19] Instead, we must determine whether the amendment meets all the relevant constitutional requirements.[20] There may be an "overarching right" to the initiative petition, "but only in accordance with the standards of the constitution; otherwise, there is an 'overarching right' to have public policy determined by a majority of the people's democratically elected representatives."[21] In particular, we have stated that the "right [of electors to propose amendments] is to be exercised in a certain way and according to certain conditions, the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution."[22]

Our inquiry here, then, is to determine the extent of the people's right to initiate constitutional amendments and whether any clear limitations may be found

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(accessed July 30, 2018) [https://perma.cc/H7PP-NHJQ]; National Conference of State Legislatures, *Recall of State Officials* <http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx> (accessed July 30, 2018) [https://perma.cc/3UVQ-CY7Y]. After a 1913 amendment removing legislative oversight of the initiative process, the initiative "has proven extremely popular," according to a study prepared for the Constitutional Convention Preparatory Commission, adding that "[i]t is among the most used of Michigan's devices for direct government." McHargue, *Direct Government in Michigan* (1961), p 19.

[19] See *Mich United Conservation Clubs v Secretary of State*, 464 Mich 359, 368-369; 630 NW2d 297 (2001) (YOUNG, J., concurring).

[20] Cf. *id*. at 389 ("[T]he people's ability to decide [whether to retain a statute] by the referendum process is not infinite; rather, it is circumscribed by the limitations placed in the Michigan Constitution.").

[21] *Id*. at 393 (MARKMAN, J., concurring).

[22] *Scott v Secretary of State*, 202 Mich 629, 643; 168 NW 709 (1918); see also *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763, 772; 822 NW2d 534 (2012) ("This Court has consistently protected the right of the people to amend their Constitution in this way, while enforcing constitutional and statutory safeguards that the people placed on the exercise of that right.").

in the Constitution.[23] As with any constitutional provision, the objective of our interpretation " 'is to determine the text's original meaning to the ratifiers, the people, at the time of ratification.' "[24] The primary rule is that of " 'common understanding,' " as Justice COOLEY explained long ago:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."[25]

To help discover the "common understanding," this Court has observed "that 'constitutional convention debates and the address to the people, though not controlling, are relevant.' "[26]

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[23] Such a clear limitation could, for example, look like the one we addressed in *Mich United Conservation Clubs*, 464 Mich 359. In that case, we examined Const 1963, art 2, § 9, which states that the constitutional referendum power "does not extend to acts making appropriations for state institutions . . . ." We had little trouble deciding that an appropriation to the state police was, under the constitutional exemption, not subject to referendum. No analogous provision appears in Article 12, § 2.

[24] *People v Tanner*, 496 Mich 199, 223; 853 NW2d 653 (2014) (citation omitted).

[25] *Federated Publications, Inc v Bd of Trustees of Mich State Univ*, 460 Mich 75, 85; 594 NW2d 491 (1999), quoting 1 Cooley, Constitutional Limitations (6th ed), p 81 (quotation marks and citations omitted).

[26] *Tanner*, 496 Mich at 226, quoting *People v Nash*, 418 Mich 196, 209; 341 NW2d 439 (1983). Indeed, this Court has stated that convention records may be "highly valuable." *Tanner*, 496 Mich at 226 n 20. Of course, we recognize that this evidence cannot be used to contradict a limitation that appears in the constitutional text.

B. OVERVIEW OF THE AMENDMENT AND REVISION PROCESS

Three basic procedures allow for alterations of the Constitution. The first, not directly relevant here, provides for "amendments" proposed in the Senate or House and approved by two-thirds of the members in each chamber, then submitted to the voters for approval.[27] Const 1963, art 12, § 2 provides the second manner of altering the Constitution, which is the one VNP attempted here: "Amendments may be proposed to this constitution by petition of the registered electors of this state."[28] "Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast" for Governor in the most recent general gubernatorial election.[29] Once the "person authorized by law to receive such petition" determines that the petition signatures were valid and sufficient, the proposed amendment is placed on the ballot.[30] Finally, under Const 1963, art 12, § 3, the third manner of changing the Constitution is by constitutional convention.[31] Every 16 years, "and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state"; if the voters vote in favor of performing a "general revision," a constitutional convention is convened for that purpose.[32]

We have explained that the adoption of the initiative power, along with other tools of direct democracy,

[27] Const 1963, art 12, § 1.

[28] Const 1963, art 12, § 2.

[29] *Id*.

[30] *Id*.

[31] Const 1963, art 12, § 3.

[32] *Id*.

"reflected the popular distrust of the Legislative branch of our state government."[33] While the right to propose amendments by initiative must be done according to constitutional requirements, we have observed that "it may be said, generally, that [the right] can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises."[34] Indeed, we have held that Article 12, § 2 is self-executing,[35] although the Constitution explicitly allows the Legislature to prescribe by law procedures regulating the initiative.[36]

C. LIMITATIONS ON VOTER-INITIATED AMENDMENTS

The scope of the initiative amendment process and its relation to the "general revision" process is at the

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[33] *Woodland v Mich Citizens Lobby*, 423 Mich 188, 218; 378 NW2d 337 (1985) (" 'The initiative found its birth in the fact that political parties repeatedly made promises to the electorate both in and out of their platforms to favor and pass certain legislation for which there was a popular demand. As soon as election was over their promises were forgotten, and no effort was made to redeem them. These promises were made so often and then forgotten that the electorate at last through sheer desperation took matters into its own hands and constructed a constitutional procedure by which it could effect changes in the Constitution and bring about desired legislation without the aid of the legislature.' "), quoting *Hamilton v Secretary of State*, 227 Mich 111, 130; 198 NW 843 (1924); see also 1 *Proceedings and Debates of the Constitutional Convention of the State of Michigan 1907-1908*, p 590 ("The trouble is not with the representative government, it is with this eternal mis-representative government . . . . We want the initiative on constitutional amendments why? Because we want the legislature to sometimes pay some attention to the voice of the people, and . . . this right in the people is necessary to a proper regulation of the legislature.") (statement of Delegate Frank Pratt).

[34] *Scott*, 202 Mich at 643.

[35] *Ferency v Secretary of State*, 409 Mich 569, 590-591; 297 NW2d 544 (1980).

[36] *Consumers Power Co v Attorney General*, 426 Mich 1, 7-8; 392 NW2d 513 (1986).

heart of this case. How extensive can a voter-initiated amendment be, and does the Constitution place any relevant subject matter limitations on such amendments?

1. CASELAW

We will begin with our caselaw on this topic, which ultimately proves unilluminating. There is no controlling authority from this Court construing the meaning of the term "amendment" in Article 12, § 2. The issue has been raised twice in the last 10 years, but neither case yielded a majority opinion from this Court construing the term "amendment" in this context. In *Citizens*,[37] the Court of Appeals addressed this issue for the first time. In that case, a group called Reform Michigan Government Now! (RMGN) submitted an initiative petition proposing a vast array of changes to Michigan's Constitution.[38] CPMC argued that "the RMGN initiative petition [was] not eligible to be placed on the ballot because it [was] not merely an 'amendment' to the constitution, but [was] a 'general revision' . . . that only a constitutional convention [could] accomplish."[39] The Court distinguished an "amendment" from a "general revision" and held:

> [I]n order to determine whether a proposal effects a "general revision" of the constitution, and is therefore not subject to the initiative process established for amending the constitution, the Court must consider both the quantitative nature and the qualitative nature of the proposed

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[37] *Citizens*, 280 Mich App 273.

[38] By the Court of Appeals' count, the RMGN initiative petition sought to alter four separate articles of the Michigan Constitution and proposed at least 29 separate changes. *Id*. at 279-281 (listing the proposed changes).

[39] *Id*. at 281-282.

> changes. More specifically, the determination depends on not only the number of proposed changes or whether a wholly new constitution is being offered, but on the scope of the proposed changes and the degree to which those changes would interfere with, or modify, the operation of government.[40]

In reaching this conclusion, the court reviewed: (1) the text of the constitutional provisions at issue;[41] (2) two cases from this Court—one interpreting a city charter under the Home Rule City Act, MCL 117.1 *et seq*.,[42] and one interpreting the predecessor provisions of the 1908 Michigan Constitution;[43] and (3) several cases from other jurisdictions, including two leading cases decided by the California Supreme Court.[44] The Court "agree[d] with the reasoning of these decisions" and found them "to be consistent with Michigan law as stated in *Laing* and *Pontiac School Dist*."[45]

Much of the Court of Appeals' analysis hinged on *Laing* and *Pontiac Sch Dist*, so it is worth considering whether those cases did, in fact, establish the above standard, and whether they are binding or persuasive authority. Despite the Court of Appeals' reliance on *Laing* and *Pontiac Sch Dist*, we find these cases to be of limited value on this topic. *Laing* is clearly distinguish-

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[40] *Id*. at 305.

[41] The Court of Appeals did not do an extended exegesis of the constitutional text and concluded that dictionary definitions from the time of ratification, "[w]hile somewhat helpful to the analysis, . . . do not completely reveal the differentiation that was intended by the framers of the constitution from their use of the words 'amendment' and 'revision.' " *Id*. at 295.

[42] See *Kelly v Laing*, 259 Mich 212; 242 NW 891 (1932).

[43] See *Sch Dist of City of Pontiac v City of Pontiac*, 262 Mich 338; 247 NW 474 (1933).

[44] See *McFadden v Jordan*, 32 Cal 2d 330; 196 P2d 787 (1948); *Livermore v Waite*, 102 Cal 113, 118-119; 36 P 424 (1894).

[45] *Citizens*, 280 Mich App at 304-305.

able because, while it addressed the distinction between a "revision" and an "amendment," it did so in the context of a city charter under the Home Rule City Act.[46] And, in any event, its discussion was unnecessary to resolving the case, since it occurred immediately after the Court's holding that "[t]he petition on its face is not in the form required by law, and raised no duty in defendants to provide for an election."[47] We agree with the Solicitor General that this case is not binding; however, the Court's opinion does give some insight into the plain meaning of the terms "amendment" and "revision" 24 years after the 1908 Constitution was ratified:

> "Revision" and "amendment" have the common characteristics of working changes in the charter and are sometimes used inexactly, but there is an essential difference between them. Revision implies a re-examination of the whole law and a redraft without obligation to maintain the form, scheme, or structure of the old. As applied to fundamental law, such as a constitution or charter, it suggests a convention to examine the whole subject and to prepare and submit a new instrument, whether the desired changes from the old be few or many. Amendment implies continuance of the general plan and purport of the law, with corrections to better accomplish its purpose. Basically, revision suggests fundamental change, while amendment is a correction of detail.[48]

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[46] *Laing*, 259 Mich at 214.

[47] *Id*. at 216.

[48] *Id*. at 217. *Laing* is noteworthy for another reason: in further dicta, the Court indicated that it considered an increase in the number of city commissioners and a change in the way their districts were drawn as properly the subject of an amendment to the city charter. See *id*. at 222 ("Speaking generally and without stopping to examine the precise effect of those at bar, it is evident that a proposal to increase the number of commissioners from five to nine, with the machinery necessary therefor [i.e., abolishing the existing districts so the new commission members could be elected by wards], would merely be a change of detail and, therefore, an amendment.").

Nine months later, in *Pontiac Sch Dist*, this Court again addressed the distinction between an "amendment" and a "revision," this time in the context of a challenge to an amendment of the Constitution proposed under Article 17, § 2 of the 1908 Constitution, the predecessor to Article 12, § 2 of the 1963 Constitution.[49] Without any discussion of the text of the provision, or citation of any authority (notably absent was any citation of *Laing*, decided less than a year earlier), the Court summarily rejected the argument that the amendment amounted to a revision because it "does not so interfere with or modify the operation of governmental agencies as to render it other than an amendment by way of an addition to the Constitution."[50] It is hard to glean much meaning from this statement, since the Court did not purport to set forth a standard to govern this question but instead merely rejected the argument in the form that it was presented. Notably, the distinction between an amendment and a revision was contained only in the parties' arguments to the Court; speaking for itself, the Court did not actually embrace a dichotomy between "amendments" and "revisions" but simply concluded that the proposal was not so dramatic a change as to "render it other than an amendment . . . ."[51]

In *Citizens*, this Court had an opportunity to resolve the case under the amendment/revision dichotomy but declined to do so, affirming the result only and fracturing on the reasoning. Three justices gave a qualified endorsement of the Court of Appeals' articulation of the distinction between an "amendment" and a "gen-

[49] *Pontiac Sch Dist*, 262 Mich at 345.

[50] *Id*.

[51] *Id.*

eral revision" of the Constitution.[52] The remaining four justices declined to adopt the Court of Appeals' standard. Three of the four agreed with the order affirming, but did so based on grounds not addressed by the Court of Appeals, namely, that "a proposal of this extraordinary scope and multitude of unrelated provisions clearly cannot be reasonably communicated to the people in 'not more than 100 words,' " as required by Article 12, § 2.[53] By its willingness to dispose of the case on the alternative ground that "[t]his language establishes a clear limitation on the scope of the constitutional amendments under [Article 12, § 2],"[54] the statement by this grouping of justices may be read as an implicit recognition that the "amendment/general revision" dichotomy did not provide such a clear limitation, at least not under the Court of Appeals' standard.[55] Justice KELLY's dissent questioned the test developed by the Court of Appeals and lamented that our failure to construct a clearer test left the state of the law unsettled.[56]

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[52] *Citizens*, 482 Mich at 964 (CORRIGAN, J., concurring, joined by TAYLOR, C.J., and YOUNG, J.) ("On the basis of my review, which was limited by time constraints, I do not see a clear error in the Court of Appeals articulation . . . .").

[53] *Id*. at 961 (CAVANAGH, WEAVER, and MARKMAN, JJ., concurring).

[54] *Id*. at 960.

[55] One member of this grouping wrote separately to make this point explicitly. See *id*. at 962 (WEAVER, J., concurring) ("The Court of Appeals opinion is an example of judicial activism—of the unrestrained, mistaken use of the power of interpretation. . . . It wrongly creates a 'judicial veto' over future voter-initiated proposed amendments by petition even if such a proposed amendment were a one (1)-issue, single-purpose amendment whose 'not more than 100 words' purpose statement for printing on the ballot would easily be sufficient, understandable, impartial, and true."). The Court of Appeals, for its part, conceded that it was unable "to define with nicety the line of demarcation between an 'amendment' and a 'general revision.' " See *Citizens*, 280 Mich App at 305 (cleaned up).

[56] *Citizens*, 482 Mich at 964, 966 (KELLY, J., dissenting).

The Court of Appeals again confronted this issue in *Protect Our Jobs v Bd of State Canvassers*.[57] As the Court summarized it, the ballot proposal at issue was narrow, providing in one constitutional section the "people with the right to organize and bargain collectively" with public and private employers, to the extent not preempted by federal law, and in another section "protecting the rights of classified civil service employees to bargain collectively concerning all conditions and aspects of employment except promotions."[58] CPMC challenged the proposal on the same grounds it asserted in *Citizens* and is asserting in this lawsuit, i.e., that it was a general revision of the Constitution under Article 12, § 3.

The Court of Appeals rejected CPMC's challenge, using the "qualitative and quantitative" standard from its decision in *Citizens* and concluding that although the proposal might affect "various provisions and statutes," it was "limited to a single subject matter" and changed only two sections of the Constitution.[59] By contrast, the RMGN proposal in *Citizens*

> sought to replace vast portions of the constitution and massively modify the structure and operation of Michigan's government. The initiative proposal here is far more akin to a correction of detail than a fundamental change, when viewed in the proper context of the constitution as a whole. See *Laing v Kelly*, 259 Mich 212, 217; 242 NW 891 (1932).[60]

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[57] *Protect Our Jobs v Bd of State Canvassers*, unpublished per curiam opinion of the Court of Appeals, issued August 27, 2012 (Docket No. 311828).

[58] *Id*. at 1-2.

[59] *Id*. at 2.

[60] *Id*. at 2-3.

This Court did not order briefing on the issue[61] and our opinion declined to address it.[62]

Thus, we could locate no controlling authority from this Court construing the meaning of the term "amendment" in Article 12, § 2. At most, *Pontiac* suggests there may be undefined limitations on what can be achieved by an amendment. Moreover, our caselaw lacks a detailed examination of this issue, especially one that conducts the proper analysis by examining the constitutional text. Perhaps as a result of veering from the text, the rather vague standard that has developed below affords courts considerable discretion in this area.[63] We believe the constitutional text provides a clearer standard, which we turn to now.

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[61] *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 862 (2012).

[62] See *Protect Our Jobs*, 492 Mich 763.

[63] The Chief Justice's dissent does not engage in a textual analysis of our Constitution—it does not, for example, directly examine the meanings of the relevant terms, but rather looks to what a few cases have said, generally, about those terms. However, "a judge must remember 'above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put upon it.' " Markman, *On Interpretation and Non-Interpretation*, 3 Benchmark 219, 220 (1987), quoting Douglas, *Stare Decisis*, 49 Colum L Rev 735, 736 (1949); see also *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 561 n 4; 737 NW2d 476 (2007) (recognizing that "the actual language of the proposed constitution constitutes the best evidence of the 'common understanding' " of the ratifiers).

Even so, we believe the Chief Justice's dissent engages in revisionist legal history when it asserts that our precedents in this area have established "longstanding standards" on this point that are "consistent and compatible with each other, as well as with what is required by our Constitution . . . ." *Post* at 118. Indeed, the opinion labors to give its rule some provenance by repeatedly citing the age of the cases it relies upon, rather than focusing on their content. See *post* at 117 ("[F]or at least the past 85 years in Michigan, governing law concerning direct constitutional change has been characterized by the following . . . ."); *post* at 122 ("[O]ur Court would recognize, as [it has] for the past 85 years . . . ."); *post* at 123 (referring to "the standard set forth by our precedents over 85 years ago"); *post* at 124 (referring to "the standard set forth by our

2. ARTICLE 12, § 2

The textual analysis begins with examining the meaning of "amendment" as used in the text.[64] "Amendment" is relevantly defined as "an alteration of a legislative or deliberative act or in a constitution; a change made in a law, either by way of correction or addition," or "the correction of an error in a writ, record, or other judicial document."[65] The definition does not directly speak to the breadth of the change

precedents over the course of 85 years"). And, for good measure, the dissent accuses the majority of altering these longstanding standards. But if the standard set forth in *Laing* and *Pontiac Sch Dist* and the Court of Appeals decisions in *Citizens* and *Protect Our Jobs* was so clear and longstanding on this point, one wonders why this Court refused to adopt it in 2008 in *Citizens*, instead issuing a highly unusual order leaving this area of law in a state of limbo. In any event, as already mentioned, *Laing* and *Pontiac Sch Dist* did not review the text of the Constitution or purport to establish any constitutional standard at all on this point. In light of this, it would be euphemistic to say that these cases have created a judicial gloss supporting the dissent's reasoning—instead, they appear to us more like a spray-on tan.

If it is bad to depart from the plain language of our Constitution on the basis of a judicial gloss that is binding precedent, how much worse it must be to do so on the basis of the spotty and inapposite authority the dissent relies upon in this case. Cf. Markman, *Resisting the Ratchet*, 31 Harv J L & Pub Pol'y 983, 985 (2008) ("[T]o read the law consistently with its language, rather than with its judicial gloss, is not to be 'harsh' or 'crabbed' or 'Dickensian,' but is to give the people at least a fighting chance to comprehend the rules by which they are governed."). Repeatedly calling these cases the "*best* and most *authoritative* and most *consistent*" precedents of this Court, *post* at 115 n 2, the "most compelling precedents of this state," *post* at 115 n 2, and the "*best* and the most *enduring* relevant precedents of this state," *post* at 125 n 9, does not make them so, even with the use of italics.

[64] Because the predecessor to Article 12, § 2 first appeared in the 1908 Constitution, Const 1908, art 17, § 2, and was retained in our current Constitution, which was ratified in 1963, we will look to dictionaries from those periods to help interpret the term.

[65] *The Century Dictionary: An Encyclopedic Lexicon of the English Language* (1911), p 173; see also *The American Heritage Dictionary of*

that can be made by amendment or provide any substantive limitations on amendments.

With regard to limitations on the scope of amendments, the text of the predecessor provision to Article 12, § 2 was meaningfully changed soon after its ratification in 1908. When it was ratified, the Constitution gave the Legislature a veto over voter-initiated amendments before the election at which the proposal would appear on the ballot, and the Legislature could also submit alternative or substitute amendments.[66] Yet despite the Legislature's considerable oversight, the framers of the Constitution nonetheless thought that "the effect of this provision [i.e., the initiative provision] will be the submission to a vote of the electors of

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the English Language (1969) ("Amendment" is "[a] correction" or "a revision or change"); *Webster's Third New Int'l Dictionary* (1966) ("Amendment" is the "act of amending," the "correction of a fault or faults," or "the process of amending"); *The Random House Dictionary of the English Language* (1966) ("Amendment" is "the act or state of amending or the state of being amended," "an alteration of or addition to a motion, bill, constitution, etc.," or "a change made by correction, addition, or deletion"). If "amendment" were considered a term of art, the dictionary definition would not be materially different. See *Black's Law Dictionary* (2d ed, 1910) ("Amendment" is "[t]he correction of an error" in any proceeding at law, or "[a]ny writing made or proposed as an improvement of some principal writing"); see also *Ballentine's Law Dictionary* (3d ed, 1969) ("Amendment" means "[a] correction or revision of a writing to correct errors or better to state its intended purpose").

[66] Const 1908, art 17, § 2 ("All petitions for amendments filed with the secretary of state shall be certified by that officer to the legislature at the opening of its next regular session; and when such petitions for any one proposed amendment shall be signed by not less than the required number of petitioners, he shall also submit the proposed amendment to the electors at the first regular election thereafter, *unless the legislature in joint convention shall disapprove* of the proposed amendment by a majority vote of the members elected. The legislature may, by a like vote, submit an alternative or a substitute proposal on the same subject.") (emphasis added).

practically all amendments petitioned for."[67] In a telling passage of the Address to the People, the framers explained that legislative oversight of the amendments proposed by initiative was a crucial factor to the convention:

> The convention realized the far-reaching effect that each amendment to the constitution may have beyond the immediate purpose intended by it, and it was deemed essential in so important a matter as changing the fundamental law of the state that the very greatest care should be required in both the form and substance of amendments to it. *Such care is secured by requiring the amendments proposed to pass the scrutiny of the legislature*.[68]

But even the legislative veto—the clearest and most significant substantive check on the petition power—was deleted by amendment in 1913.[69] In light of this history, we should be wary of finding atextual limitations on voter-initiated amendments.

The critical limitation in Article 12, § 2—at least based on the amount of discussion it prompted at the 1961–1962 convention—is instead the *procedural* requirement of obtaining a certain number of signatures. Originally, signatures in a number equal to 20 percent of the vote at the most recent election for secretary of state had to be collected, but in 1913 this threshold was reduced to 10 percent of the votes for Governor at the

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[67] Address to the People, Const 1908, art 17, §§ 2 and 3 (1908), p 64 (emphasis added).

[68] *Id*. (emphasis added).

[69] See *Direct Government*, p 19 (discussing the 1913 amendment); see also Fairlie, *The Referendum and Initiative in Michigan*, 43 Annals of Am Acad of Pol and Soc Sci 146, 153 (Sept 1912) (observing that for a few years after the 1908 Constitution was in place, no amendments were proposed, and speculating that this was "due in part to the restrictions in the method provided").

most recent general gubernatorial election.[70] The importance of this restriction in the constitutional framework was made abundantly clear by the framers of the 1963 Constitution, who engaged in a spirited debate regarding the signature requirement. At the convention, it was proposed, and briefly added to the constitution under consideration, that the 10 percent requirement be amended to include "or 300,000 such registered electors, whichever shall be less."[71] The effect would have been to make it progressively easier to obtain enough signatures as the population increased. Delegate J. Harold Stevens successfully recommended striking this addition, arguing that the voter-initiated amendments should not be too easy to accomplish.[72] But his concern reflected his belief that initiative amendments should not be akin to "statutory matter."[73] He did not want to debase the Constitution by cluttering it with trivial amendments—in other words, he wanted amendments to be important enough to merit inclusion in a constitution. He was not, then, suggesting that initiative amendments should be limited to trivial matters; quite the contrary.[74]

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[70] See Const 1908, art 12, § 2.

[71] 2 Official Record, Constitutional Convention 1961, p 2459 (capitalization altered).

[72] *Id*. at 2462-2465.

[73] *Id*. at 2462 (statement of Delegate Stevens). He later said his "objection to this provision [i.e., the 300,000 vote provision] and the reason for this amendment is simply to make it more difficult to amend the constitution than to pass an ordinary statute." *Id*. at 3199. This was a real concern because, as he noted, the Constitution at that time only required signatures equal to 8 percent of the votes for Governor from the most recent general gubernatorial election in order to propose legislation by initiative petition. *Id*. at 2462.

[74] A similar argument was made in 1913, when the Legislature was considering an amendment that would relax the restrictions on voter-initiated amendments. See 1913 House Journal 698 ("It may be true

Thus, the convention decided to keep voter-initiated amendments difficult *because* amendments, like the Constitution itself, were intended to deal with serious matters. The convention accomplished its goal by imposing what it viewed as the clearest and most stringent limitation on initiative amendments: a signature requirement.[75]

3. ARTICLE 12, §§ 2 AND 3: THE NEW-CONSTITUTION TEST

The relevant substantive limitation on the scope of voter-initiated amendments arises from the text of Article 12, § 2 when read together with Article 12, § 3. By adopting these two different procedures for altering the Constitution, the framers intended that the mechanisms must be different in some regard. As one treatise similarly observed in 1910:

> It may be argued . . . that if a constitution specifically provides two methods of alteration, the language employed with reference to the proposal of amendments by the legislative method may, when read with that concerning the convention method, often be construed as an implied prohibition of complete constitutional revision by the legislative method.[76]

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that [requiring signatures from 20 percent of the electors] is too high a percentage. However, the Constitution is the bulwark and foundation of our laws, and constitutional amendments have broader significance than statutory amendments," and accordingly some figure higher than 8 percent was appropriate) (statement of Representative Charles McBride).

[75] There are, of course, other provisions in the text, such as the 100-word summary requirement, that are not germane to resolving the present case. See Const 1963, art 12, § 2 ("The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption.").

[76] Dodd, *The Revision and Amendment of State Constitutions* (Baltimore: Johns Hopkins Press, 1910), p 261. The treatise was written at a

In other words, the distinction between changes proposed by amendments and changes proposed by a convention indicates a substantive difference that limits the breadth of amendments.

Our Constitution tells us what this basic difference is. The result of a constitutional convention called to consider a "general revision" is a "proposed constitution or amendments" adopted by the convention and proposed to the electors.[77] The convention, then, can propose amendments to the existing Constitution or offer a new constitution.[78] By contrast, if approved, a

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time when popularly initiated constitutional amendments, such as the petition initiative here, were just coming into use and legislatively initiated amendments were more common; but in either case the comparison is between an amendment and a revision. See generally Goebel, *A Government by the People: Direct Democracy in America, 1890–1940* (Chapel Hill: University of North Carolina Press, 2002), pp 27-29 (noting that legislatures originated many constitutional amendment proposals in the nineteenth century and that the mechanism for popularly initiated amendments began only in the last decade of that century); Jameson, A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding (1887), § 544, pp 568-569 (writing near the end of the nineteenth century and noting that, with few exceptions, constitutional change came only after the legislature either called a convention or proposed an amendment).

[77] Const 1963, art 12, § 3.

[78] As members of the 1961–1962 constitutional convention recognized, a convention had unrestrained authority to offer a new constitution or narrower amendments. One delegate noted that a convention, "if it so saw fit, could, for all intents and purposes disregard the idea of a general revision and merely confine itself to a single amendment or a few amendments and leave the basic document unchanged . . . ." 2 Official Record, Constitutional Convention 1961, p 3007 (statement of Delegate Alvin Bentley). This was because, as another delegate observed, conventions were "sovereign, autonomous bodies." *Id*. (statement of Delegate Donald Habermehl). A convention's broad discretion has long been noted. See *Direct Government*, p 9 ("[T]he convention is also used for the purpose of initiating amendments to an existing document."); *Revision and Amendment*, p 258 ("Yet of course a constitutional convention when assembled may not make a general

voter-initiated amendment under Article 12, § 2 "shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution . . . ."[79] Consequently, an amendment does not replace a constitution in full, but simply adds to or abrogates specific provisions in an existing constitution.[80] Thus, the constitutional text distinguishes between amendments that can be made by petition and new "constitutions." Because only the convention has the power to propose a constitution, by logical implication an initiative amendment cannot do so. And since this limitation would be meaningless if it only required a new constitution to be *labeled* as an amendment, it follows that an initiative amendment cannot propose changes that are tantamount to the creation of a new constitution.[81]

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revision but may simply propose specific amendments."); *id*. at 258 n 243 ("It lies within the discretion of a convention ordinarily as to whether its action shall be substituted (1) in the form of separate amendments, or (2) as a complete new constitution, or (3) as a new constitution but with separate provisions which may be voted upon independently. As between the first and second plans it may be said that the second is to be preferred if the changes are so great as to make submission as separate amendments confusing . . . .").

[79] Const 1963, art 12, § 2.

[80] Cf. *Livermore*, 102 Cal at 118-119 (observing that "the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument").

[81] Cf. *Attorney General ex rel Vernor v Common Council of Detroit*, 168 Mich 249, 252; 133 NW 1090 (1912) (noting, with regard to changes to a city charter, that "a general revision of an old charter may be treated as equivalent to the framing of a new charter"). As one treatise explained, around the time we adopted our Constitution, it might be "legally proper . . . in the absence of specific constitutional restrictions to propose to the people by the legislative process [for initiating amendments] any constitutional alteration short of a complete revision or even a complete revision." *Revision and Amendment*, p 261. The treatise noted, however, that "if a constitution specifically provides two methods of alteration, the language employed with reference to the proposal of amendments by the legislative method may, when read with that

The phrase "general revision" supports this dichotomy between amendments and "new" constitutions, although the phrase has engendered some confusion. The "purpose" of a convention is to consider "the question of a general revision of the constitution . . . ."[82] "General" means "dealing with all or the overall, universal aspects of the subject under consideration . . . ."[83] "Revision," in turn, is relevantly defined as "the act or work of revising."[84] This is how we

concerning the convention method, often be construed as an implied prohibition of complete constitutional revision by the legislative method." *Id*. The same basic point can be made about our initiative method of amendment. But, as the explanation above demonstrates, the text and structure of our Constitution establishes the prohibition on completely rewriting the Constitution by means of an initiative amendment.

[82] Const 1963, art 12, § 3.

[83] *The Random House Dictionary of the English Language* (1966). Other dictionaries accord with this definition. See, e.g., *Webster's Third New Int'l Dictionary* (1967) ("General" is "involving or belonging to the whole of a body . . . rather than to a limited part, group, or section," "concerned or dealing with universal rather than particular aspects," "marked by broad overall character without being limited, modified, or checked by narrow precise considerations").

[84] *The Random House Dictionary of the English Language* (1966). The same basic definition appears in other dictionaries. See *The American Heritage Dictionary of the English Language* (1969) ("Revision" is "[t]he act or procedure of revising"); *Webster's Third New Int'l Dictionary* (1967) ("Revision" is "an act of revising : re-examination or careful reading over for correction or improvement"); *The Century Dictionary: An Encyclopedic Lexicon of the English Language* (1911) (defining "revision" as "[t]he act of revising; reëxamination and correction"). As with the term "amendment," discussed above, the relevant dictionary definition does not change if we considered "revision" to be a legal term of art. See *Ballentine's Law Dictionary* (3d ed, 1969) ("Revision" means "[l]ooking over a thing . . . and reviewing it carefully for the purpose of making changes, additions, and corrections, if such be deemed advisable"); *Black's Law Dictionary* (2d ed, 1910) (not defining "revision" but defining "revise" as "[t]o review, re-examine for correction; to go over a thing for the purpose of amending, correcting, rearranging, or otherwise improving it").

characterized the term in *Laing*[85] and how it was described at the 1908 convention: "What is meant by revision or to revise? Why simply to re-examine for the purpose of correction—the act of reviewing or re-examination for the purpose of correction."[86] The "revision" is simply the process for reconsidering the constitution as a whole. It is not, as some Court of Appeals opinions suggest,[87] a particular document or proposed change. Thus a "revision" is not contradistinguished from an "amendment." Rather, as noted, the distinction between the Article 12, § 3 convention process and the Article 12, § 2 amendment process is that the former can produce a proposed constitution, while the latter is limited to proposing less sweeping changes.[88]

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[85] See *Laing*, 259 Mich at 217 ("Revision implies a re-examination of the whole law . . . .").

[86] 1 *Proceedings and Debates of the Constitutional Convention of the State of Michigan 1907-1908*, p 611 (statement of delegate Benjamin Heckert).

[87] See, e.g., *CPMC*, 324 Mich App at 589 ("Our courts long have recognized that an amendment is not the same as a general revision and have attempted to define the differences between them where the constitutional provisions themselves do not define the terms."); *Citizens*, 280 Mich App at 277 ("As we will explain, the Michigan Constitution clearly establishes separate methods for enacting an 'amendment' to, as compared to a 'general revision' of, the constitution.").

[88] This distinction is further borne out by the much different requirements for calling a convention under Article 12, § 3 and for initiating an amendment proposal under Article 12, § 2. The most significant hurdle to placing a proposed amendment on the ballot by initiative petition under Article 12, § 2 is the requirement of obtaining signatures from "registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor" at the most recent general gubernatorial election. Const 1963, art 12, § 2. If the petitioner summarizes the proposal in a statement of not more than 100 words and complies with various ministerial requirements, the initiative will appear on the ballot. *Id*. By contrast, to call a convention, voters must

Having determined that the relevant substantive limitation is that a voter-initiated amendment cannot be equivalent to a new constitution, we must determine what this limitation entails. As an initial matter, the number of changes is not dispositive, as even a limited number of changes can have the effect of creating a new constitution.[89] A constitution, after all, is more than words on a page. Its most basic functions are to create the form and structure of government, define and limit the powers of government, and provide for the protection of rights and liberties.[90] These are

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either persuade the Legislature to pass a bill placing on the ballot the question of whether to call a convention, or the voters must wait until the question is placed on the ballot automatically every 16 years. Const 1963, art 12, § 3. If a majority of the voters at that election agree, a convention will be held. *Id*. This, in turn, requires 148 individual elections for the delegates (determined by the number of senators and representatives in the Legislature), the drafting and approval of language at the convention, and then a subsequent vote of the electors on whatever the convention produces. *Id*. Clearly, the more cumbersome and arduous process for calling a convention reflects the fact that a convention can produce more sweeping changes than can a lone amendment proposed by initiative. See *Revision and Amendment*, p 261.

[89] Cf. *Opinion of the Justices*, 264 A2d 342, 345 (Del, 1970) ("A threshold truism is that the mere *number* of changes cannot make the difference. Legislative amendments are not limited in number by [the constitution]; and a 'revision' . . . does not come into being by reason of the mere number of changes or the mere fact that the changes concern the entire Constitution."). The test we adopt today is based on the constitutional text. By contrast, the qualitative/quantitative test used by the Court of Appeals, and endorsed in an altered form by the Chief Justice's dissent, comes from a line of California caselaw that began in the nineteenth century. See *Citizens*, 280 Mich App at 299-305 (tracing California law and adopting it as consistent with our law).

[90] See *New York Times Co v Sullivan*, 376 US 254, 275; 84 S Ct 710; 11 L Ed 2d 686 (1964) (noting the view of James Madison "that the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty' "), quoting 4 Elliot's Debates on the Federal Constitution (1876), pp 569-570; Wood, *Creation of the American Republic 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), p 600 ("A constitution for Americans, said

the basic threads of a constitution, and when they are removed, replaced, or radically rewoven, the whole tapestry of the constitution may change.

Therefore, changes that significantly alter or abolish the form or structure of our government, in a manner equivalent to creating a new constitution, are not amendments under Article 12, § 2.[91] Contrary to the suggestion in *Pontiac Sch Dist*,[92] it is not necessarily the impact on the operations of government that matters—like the United States Supreme Court, we decline to accept "the narrow-minded assumption" that the only purpose of our constitutional provisions "is to make the government run as efficiently as possible."[93] Further, a change that recalibrates the relative power

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Thomas Paine, was 'not a thing in name only; but in fact. . . . It is the body of elements to which you can refer, and quote article by article; and which contains . . . every thing that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound.' "), quoting Paine, *Rights of Man*, in 1 Foner, ed, *Complete Writings of Thomas Paine* (New York: The Citadel Press, 1945), p 278; see also Friedman, *A History of American Law* (New York: Simon & Schuster, 2005), p 74 ("A constitution is different from ordinary statute law. It has two crucial functions. First, it sets up and sets out the structure of government—its permanent shape, its organs or parts, and their rights, duties, boundaries, and limits. Second, it can list the essential rights of the citizen; this list is supposed to limit what government is allowed to do[.]").

[91] Cf. *Bess v Ulmer*, 985 P2d 979, 987 (Alas, 1999) ("The core determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole."); *Amador Valley*, 22 Cal 3d at 223 (1978) ("However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also.").

[92] See *Pontiac Sch Dist*, 262 Mich at 345.

[93] *Nat'l Labor Relations Bd v Noel Canning*, 573 US 513, 579; 134 S Ct 2550; 189 L Ed 2d 538 (2014) (Scalia, J., concurring in judgment); see also *id*. (" 'Convenience and efficiency,' we have repeatedly recognized, 'are not the primary objectives' of our constitutional framework.") (citation omitted).

of the branches of government—such as limiting or taking away a specific power from one branch—is not, absent a significant effect on the structure of government, a change that is tantamount to the creation of a new constitution.[94] Indeed, we have stated that, despite its eliminating power from the judiciary or executive branch, an amendment permitting indeterminate criminal sentences was "the people['s] exercise[] [of] a right inherent in them to adopt a constitutional amendment taking away from, or adding to, the powers of either of the departments of government."[95] In fact, it would be difficult to imagine many amendments that leave the proportionate powers of the branches completely unchanged.[96]

IV. APPLICATION

Given the above analysis, VNP's proposal will be considered a permissible amendment if it does not propose changes that significantly alter or abolish the form or structure of our government in a way that is tantamount to creating a new constitution. To answer this question, we must examine our current law on redistricting and apportionment and how VNP's proposal would change that law.

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[94] See, e.g., *Bess*, 985 P2d at 988 (holding that a proposed amendment of a constitution that would transfer reapportionment authority from the executive branch to an independent board was a permissible amendment because "the qualitative force of this narrow change" was not great enough, even though "[r]eassigning this power [was] unquestionably a significant change in the present system").

[95] *People v Cook*, 147 Mich 127, 132; 110 NW 514 (1907).

[96] Plaintiffs do not contend that the Constitution requires amendments to have only a single purpose and that VNP's proposal therefore fails because it has multiple purposes. In fact, in the Court of Appeals, they disclaimed this argument. Therefore, we decline to decide whether the Constitution requires amendments to have only a single purpose and instead leave that question for another day.

A. APPORTIONMENT AND REDISTRICTING

Under our first three Constitutions, the Legislature was granted authority to redistrict.[97] But the Legislature did not always carry out this responsibility.[98] In light of this history, two competing voter-initiated amendments to the then-existing Constitution were placed on the November 1952 ballot.[99] One was approved, which wrote directly into the Constitution the then-existing alignment of seats in the Senate provided for in the 1952 amendment, added 10 seats to the House, and conferred upon the Board of State Canvassers the obligation to draw up new house districts if the Legislature failed to act.[100]

Our present Constitution, as ratified by the voters in 1963, laid out a different framework for reapportionment and redistricting, although for reasons that will become clear below, it is not currently followed.[101]

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[97] See Const 1835, art 4, § 3; Const 1850, art 4, § 4; Const 1908, art 5, § 4 (as ratified).

[98] For example, around 1910, when the federal census was completed showing that the urban population was growing, "[m]embers of the legislature, the majority of whom represented rural areas and small towns, balked at carrying out the requirement that the legislature be reapportioned in 1913 and every tenth year thereafter," and consequently, no reapportionment occurred in 1923 or 1933 (although a belated senate reapportionment was adopted in 1925). Dunbar & May, *Michigan: A History of the Wolverine State* (Grand Rapids: William B Eerdmans Publishing Co, 1995), pp 548-549. Ten years later, when it again came time to reapportion, the Senate was not reapportioned, although the House passed legislation to reapportion. *Id*. at 549.

[99] *Id*.

[100] See *id*.; Const 1908, art 5, §§ 2 through 4 (as amended).

[101] Concern was expressed at the convention that redistricting by the Legislature may not be the best approach. See 2 Official Record, Constitutional Convention 1961, p 2014 (noting that "[r]eliance on legislatures to reapportion themselves generally has been futile. Most authorities agree that self reapportionment poses so many problems

Under the Constitution, "the 38 members of Michigan's senate and the 110 members of the house of representatives are elected according to the district in which they reside. The Constitution sets forth the apportionment factors and rules for individual districts, which are redrawn after" the federal census is published.[102] The Constitution aligns the senate districts with counties and apportions senators based on "factors" consisting of percentages of the county's population and "land area" in the state.[103] The house districts were based on counties and apportioned according to population.[104] In other words, the apportionment was based on "weighted land area/population formulae."[105]

A key innovation of the 1963 Constitution was to create a bipartisan "commission on legislative apportionment" to draw the relevant district lines.[106] The commission consisted of eight seats, with the major political parties each entitled to appoint four members.[107] The Secretary of State was the commission's nonvoting secretary, required to furnish "all necessary technical services," and the Legislature was required to "appropriate funds to enable the commission to carry out its activities."[108] The commission was re-

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that it is seldom voluntarily undertaken by legislatures") (statement by Delegate John Hannah); see also *id*. at 2015 ("[The committee on legislative organization] became convinced that it is totally unrealistic to expect a legislature to redistrict and reapportion seats in its own body. Redistricting inevitably involves the possible denial of seats to members of the existing legislature . . . .").

[102] *CPMC*, 324 Mich App at 573, citing Const 1963, art 4.

[103] Const 1963, art 4, § 2.

[104] Const 1963, art 4, § 3.

[105] *In re Apportionment of State Legislature—1982*, 413 Mich at 107.

[106] Const 1963, art 4, § 6.

[107] *Id*.

[108] *Id*.

quired to "hold public hearings as may be provided by law."[109] The commission had to complete its work within 180 days of the census data becoming available.[110] Each final apportionment and districting plan adopted by the commission had to be published and would become law 60 days after publication.[111] If the commission could not agree on a plan, commissioners could submit plans to our Court, which was required to "determine which plan complies most accurately with the constitutional requirements" and direct that the plan be adopted.[112] The Court was also given jurisdiction over any application filed by electors within 60 days of publication of the plan.[113]

As our present Constitution was being deliberated at the 1961–1962 constitutional convention, the United States Supreme Court was also considering constitutional challenges to apportionment schemes. In 1962, that Court held that challenges to apportionment plans were justiciable, setting the stage for vast changes in this area of law.[114] Two years later, in *Reynolds v Sims*, the Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[115] Geographical considerations, such as apportionment based on counties, could no longer play a role in apportionment if they

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *Id*.

[113] *Id*. In 1963, the Legislature passed a statute to provide for the redistricting commission. 1963 (2d Ex Sess) PA 46, MCL 4.11 *et seq*. The statute has never been repealed and remains on the books.

[114] *Baker v Carr*, 369 US 186, 237; 82 S Ct 691; 7 L Ed 2d 663 (1962).

[115] *Reynolds v Sims*, 377 US 533, 568; 84 S Ct 1362; 12 L Ed 2d 506 (1964).

produced population deviations between the districts.[116] One week after *Reynolds* was decided, the United States Supreme Court peremptorily reversed a federal district court's earlier judgment that Michigan's apportionment rules were constitutional, which invalidated them.[117]

Days after *Reynolds* was decided, we ordered the commission to adopt a new plan for redistricting and apportionment that complied with the Supreme Court's decisions in *Reynolds* and various related cases decided the same day.[118] When the commission failed to reach an agreement, we issued an opinion directing it to adopt the so-called Austin-Kleiner Plan, as it most closely adhered to the new constitutional requirements.[119] In a concurrence, Justice SOURIS argued that the commission "was so dependent upon the continuing validity of the [now unconstitutional apportionment formula] by which the commission's duties were specified and expressly limited, that it could not survive alone."[120]

The apportionment issue was back before the Court in 1972 after the commission once again deadlocked

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[116] See *id*. at 567 ("[T]he weight of a citizen's vote cannot be made to depend on where he lives.").

[117] See *Marshall v Hare*, 378 US 561; 84 S Ct 1912; 12 L Ed 2d 1036 (1964), rev'g 227 F Supp 989 (ED Mich, 1964).

[118] *In re Apportionment of State Legislature—1964*, 373 Mich 247, 248-249; 128 NW2d 721 (1964).

[119] *In re Apportionment of State Legislature—1964*, 373 Mich 250, 254; 128 NW2d 722 (1964).

[120] *Id*. at 259 (SOURIS, J., concurring); see also *id*. ("It is incomprehensible to me that the people of this State . . . would have intended to grant a commission composed of 8 members selected by the 2 major political parties in the State from 4 specifically designated areas of the State the power of apportionment and districting of the State's legislature without the very specific and rigidly limiting directions unconstitutionally and ineffectually sought to be imposed upon the commission by the [apportionment formulas].").

and invoked our supervision.[121] We ordered the adoption of a proposed apportionment plan, but did not comment on the viability of the commission.[122] Justice T. G. KAVANAGH dissented, reaching the same conclusion Justice SOURIS had in 1964: the commission could not exist—i.e., was not severable from—the unconstitutional apportionment standards in our Constitution.[123]

In 1982, with yet another deadlocked commission seeking our supervision, we adopted the position of Justices SOURIS and T. G. KAVANAGH by declaring that the commission was not severable from the unconstitutional apportionment provisions it was directed to implement.[124] We thought the commission was inseparable from the unconstitutional standards because holding otherwise would have required us to opine on whether the people would have voted for the commission without those standards.[125] Because the issue of changing how legislators are chosen is "a fundamental matter," we would not "speculate on a matter of such enormous importance."[126] Critically, we emphasized repeatedly that "[t]his is a decision which the people should make."[127] It was a decision, we suggested, that the people could initiate through a constitutional amendment:

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[121] See *In re Apportionment of State Legislature—1972*, 387 Mich 442; 197 NW2d 249 (1972).

[122] *Id*. at 458.

[123] *Id*. at 493 (T. G. KAVANAGH, J., dissenting).

[124] *In re Apportionment of State Legislature—1982*, 413 Mich at 116.

[125] *Id*. at 136-137.

[126] *Id*. at 137-138.

[127] *Id*. at 138; see also *id*. ("The matter should be returned to the political process in a manner which highlights rather than hides the choices the people should make.").

> The power to redistrict and reapportion the Legislature remains with the people. The people, however, can only exercise that power, as a practical matter, by amending the constitution, which, unless the Legislature proposes an amendment acceptable to the people, is a difficult and time-consuming process.[128]

Tellingly, we noted in the same discussion that "[t]he initiative process is also difficult and time-consuming."[129] Because that process was slow, and a plan needed to be formulated in the meantime, we appointed an individual to oversee the drawing of a redistricting and apportionment plan consistent with various principles we established.[130] We noted, however, that the Legislature could draw its own plan, which would supersede the one we set in motion.[131] But again, we stressed that our plan was merely a stopgap that would "stand until the people act, or it is changed by the collective action of the other two branches of this government, composed of persons who are the most immediate representatives of the people."[132] It was not until 1996 that the Legislature codified apportionment standards and committed itself to drawing districts in the future.[133]

Thus, the last time the voters had direct input on this issue, they opted for apportionment and redistricting to be conducted by a commission. The rules to be implemented by that commission have been declared unconstitutional, and we deactivated the commission by con-

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[128] *Id*. at 139-140.

[129] *Id*. at 140 n 25.

[130] *Id*. at 140-142.

[131] *Id*. at 142-143.

[132] *Id*. at 140.

[133] See 1996 PA 463 (state legislative districts); 1999 PA 221 (federal congressional districts).

cluding that it was not severable from those unconstitutional rules. The Legislature now exercises a power that the Constitution of 1963 expressly denied to it—to draw legislative districts—because our Constitution has never been amended to modify the unconstitutional provisions concerning apportionment and redistricting.

B. THE VNP PROPOSAL

That is precisely what VNP's constitutional amendment proposes to do. To accomplish this task, the proposal would eliminate the current language in the Constitution laying out the apportionment formulae.[134] Instead, seven criteria are proposed, requiring that the districts must, in order of priority: (1) have "equal population as mandated by the United States Constitution," (2) "be geographically contiguous," (3) "reflect the state's diverse population and communities of interest," (4) "not provide a disproportionate advantage to any political party," measured by "accepted measures of partisan fairness," (5) "not favor or disfavor an incumbent elected official," (6) "reflect consideration of county, city, and township boundaries," and (7) "be reasonably compact."[135]

Rather than rewriting the constitutional section governing the commission, the VNP proposal simply deletes the language in Const 1963, art 4, § 6 establishing the commission.[136] In its place, the proposal offers a reformed commission that is similar to its

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[134] VNP proposal, art 4, §§ 2 through 3.

[135] VNP proposal, art 4, § 13. Although the proposed language is presented capitalized, this opinion presents it in standard type throughout for ease of reading.

[136] VNP proposal, art 4, § 6.

predecessor.[137] Like the old one, it consists of four members from each major political party, but it would have five additional members who are declared independent voters.[138] All 13 members would be selected from a pool of candidates who have submitted applications, taken oaths, and met various other requirements.[139] The leaders of both parties in the Senate and House can strike, in total, 20 names from the applicant pools.[140] The commission, once selected, must hold public hearings, and its contact with the public is regulated in detail by the proposal.[141] A plan is adopted only with at least two votes from each subgroup (Republicans, Democrats, and independents), as well as a majority of the whole.[142]

The proposal continues nearly verbatim various ancillary provisions from the 1963 commission. The Secretary of State, for example, remains a nonvoting secretary of the commission, charged with providing the commission "all technical services that the commission deems necessary."[143] Likewise, the Legislature remains obligated to "appropriate funds" for the commission, although the proposal provides a detailed breakdown of what the funds go to, whereas the 1963 Constitution simply required the appropriation of sufficient funds "to enable the commission to carry out its activities."[144] Our Court has a similar, if perhaps nar-

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[137] VNP proposal, art 4, § 6(2).

[138] *Id*.

[139] *Id*.

[140] VNP proposal, art 4, § 6(2)(E).

[141] VNP proposal, art 4, §§ 6(8) through (11).

[142] VNP proposal, art 4, § 6(14).

[143] VNP proposal, art 4, § 6(4); see Const 1963, art 4, § 6 ("all necessary technical services").

[144] VNP proposal, art 4, § 6(5); Const 1963, art 4, § 6.

rower, jurisdictional grant under the proposal: we can "direct the Secretary of State or the commission to perform their respective duties," and we may also "review a challenge to any plan adopted by the commission" and "shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this Constitution, the Constitution of the United States or superseding federal law."[145] The proposal adds various provisions clarifying that the commission's power is legislative and not subject to the Legislature's[146] or the Governor's[147] control, and the vesting clauses of the judicial, executive, and legislative branches are amended so as to vest power in their respective branches "except to the extent limited or abrogated" by certain of the new provisions.[148]

C. ASSESSING THE PROPOSAL

To determine whether VNP's proposal is a permissible amendment, we must ask whether it significantly alters or abolishes the form or structure of our government in a manner that is tantamount to creating a new constitution.[149]

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[145] VNP proposal, art 4, § 6(19). By statute, we presently have "original and exclusive state jurisdiction to hear and decide all cases or controversies . . . involving a redistricting plan" drawn under the current scheme. MCL 4.262.

[146] VNP proposal, art 6, § 6(22).

[147] VNP proposal, art 5, § 2.

[148] VNP proposal, art 4, § 1; VNP proposal, art 5, § 1; VNP proposal, art 6, § 1.

[149] The baseline for measuring these changes includes more than just the current procedure, but also, and perhaps even more importantly, the provisions in the 1963 Constitution that are no longer effective. It is, after all, the Constitution that would be amended by VNP's proposal, not the current statutory scheme that has filled the gap created by our decision holding that the present constitutional provisions are unconstitutional. See *In re Apportionment of State Legislature—1982*, 413 Mich at 115-116.

Despite our ruling, we have no power to make the law disappear. Cf. *Steffel v Thompson*, 415 US 452, 469; 94 S Ct 1209; 39 L Ed 2d 505 (1974) (" 'Of course, a favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear.' ") (citation omitted); *Winsness v Yocom*, 433 F3d 727, 728 (CA 10, 2006) ("There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts."); *Pidgeon v Turner*, 538 SW3d 73, 88 n 21 (Tex, 2017) ("When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it."); see generally Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va L Rev (forthcoming 2018), pp 4-5 ("[T]he statute continues to exist, even after a court opines that it violates the Constitution, and it remains a law until it is repealed . . . ."). Indeed, that is why VNP's proposal strikes out various provisions long held unconstitutional. This is not to say that those provisions could now constitutionally be enforced; rather, they simply remain relevant in determining the degree of change wrought by VNP's proposal. In this regard, it is also noteworthy that the statutory framework created in 1963 to effectuate the redistricting commission has never been repealed. See MCL 4.11 to 4.20. In other words, current statutes appear to require that the commission convene and submit redistricting plans.

The Chief Justice's dissent appears to suggest that judges have the power not just to declare a legal provision to be unconstitutional (i.e., to say what the law is), but rather to actually amend the Constitution by deleting from it any text the judge declares to be unconstitutional. His dissent, then, seems to suggest that a court can physically remove written text of statutes and constitutions. But that is simply not how a judgment of even the highest court in the land works. Cf. Mitchell, *Textualism and the Fourteenth Amendment*, 69 Stan L Rev 1237, 1298 (2017) ("Judicial review means only that the Court may decline to enforce a federal statute in a particular case—if (and only if) the Court concludes that enforcing the statute would conflict with its paramount duty to obey the Constitution. But federal statutes that the Supreme Court has declared 'unconstitutional' remain laws until Congress repeals them, and the Court must enforce those laws when it can do so consistent with the Constitution.") (citations omitted). Tellingly, the Chief Justice's dissent cites several abrogated federal constitutional provisions, but these are easily distinguished given that the people have chosen to affirmatively abrogate them by ratifying superseding amendments. That is not the case here. Our decision declaring that the commission could not be severed from unconstitutional standards was not a superseding constitutional amendment,

One central feature of the VNP amendment is that it sweeps away unconstitutional provisions that have remained in the Constitution for some time. The "weighted land area/population formulae" and the accompanying apportionment factors[150] are gone, and so counties would not be the organizing feature of redistricting plans. But these changes involve no great transformation because these features were held unconstitutional 36 years ago. In their place our state has used federal constitutional requirements and various state "guidelines,"[151] enacted in 1996, including that the districts "[be] areas of convenient territory contiguous by land,"[152] "preserve county lines with the least cost to the principle of equality of population,"[153] and remain as compact as possible when drawn within a city or township with multiple districts.[154] VNP's proposed standards reflect many of the same principles, including, of course, adhering to federal law, and also requiring contiguous districts, respecting municipal boundaries, and seeking reasonable compactness.[155] The proposal contains a few new items too, such as considerations of partisan fairness. But given their continuities with the current standards, VNP's proposed standards are no revolution in redistricting, and they certainly do not portend a transformation of our form or structure of government.

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but rather a judicial remedy to cure a conflict between our state Constitution and the United States Constitution.

[150] *In re Apportionment of State Legislature—1982*, 413 Mich at 107.

[151] MCL 4.261; MCL 3.63.

[152] MCL 4.261(c); MCL 3.63(c)(*i*).

[153] MCL 4.261(e); see also MCL 3.63(c)(*ii*) ("Congressional district lines shall break as few county boundaries as is reasonably possible.").

[154] MCL 4.261(i); MCL 3.63(c)(*vi*).

[155] VNP proposal, art 4, § 13.

As noted above, various provisions in VNP's proposal mirror those in the current Constitution. The Secretary of State has substantially the same general responsibilities, being the nonvoting secretary of the commission responsible for furnishing its needs.[156] The Secretary of State has more detailed obligations under the proposal, involving the formation of the commission.[157] But these tasks are ministerial and in line with our current Constitution—requiring the Secretary of State to manage applications or other records is business as usual, not a new way of governing Michigan.[158]

Since plaintiffs and the Chief Justice's dissent concede that "the people can alter the power of redistricting by amending the Constitution,"[159] the more significant argument against the VNP proposal is that it disrupts the separation of powers. The powers are most glaringly reconfigured, according to plaintiffs, by the proposal's inclusion of limiting language in the vesting clauses of each branch. The legislative, executive, and judicial branches are given their respective powers "except to the extent limited or abrogated" by certain parts of the proposal.[160] The dissent takes the position that these changes "fundamentally change the opera-

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[156] Compare Const 1963, art 4, § 6, with VNP proposal, art 4, § 6(4).

[157] VNP proposal, art 4, § 6(2) (requiring the Secretary of State to make applications available and accept completed applications, require oaths to be taken, remove incomplete or inadequate applications, and randomly select applicants).

[158] See, e.g., MCL 324.80320(3) ("Receipt by the secretary of state of a properly tendered application for a certificate of title on which a security interest in a watercraft is to be indicated is a condition of perfection of a security interest in the watercraft . . . ."); MCL 257.248(1) (requiring the Secretary of State to "conduct [an] investigation within 15 days after receiving the application" for a dealer license).

[159] *Post* at 129 n 12.

[160] VNP proposal, art 4, § 1; VNP proposal, art 5, § 1; VNP proposal, art 6, § 1.

tion of our government" by limiting the vested powers of the branches and creating a new commission with responsibility for redistricting.[161] We disagree.

The limitations in the vesting clauses are, in many ways, the result of VNP's attempt to comply with other requirements in Article 12, § 2. By including this language, the proposal simply seeks to harmonize its changes with the rest of the Constitution. This is important because Article 12, § 2 requires that the proposal republish for the voters any portion of the present Constitution that the proposed amendments would alter or abrogate.[162] This requirement has kept at least one proposal off the ballot in the recent past.[163] By explicitly adding limitations to the vesting clauses here, VNP sought to avoid any argument that it was implicitly altering or abrogating the vesting clauses or other parts of the Constitution. More broadly, by adding this language, the proposal makes explicit what would have been implicit without the language—the proposal does have some effect on the responsibilities and powers of the branches of government. But the proposed language in the vesting clauses tells us nothing useful to the critical inquiry: just how significant are the changes? The proposal is in jeopardy only if the changes are equivalent to the creation of a new constitution. To answer that question, we have to examine the proposed changes that affect the branches' relative powers.

To begin, consider how the proposal would change the present Constitution with regard to the Legisla-

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[161] *Post* at 144.

[162] Const 1963, art 12, § 2.

[163] See *Protect Our Jobs*, 492 Mich at 773-774 (holding that one of the proposed amendments altered or abrogated an existing constitutional provision, triggering the republication requirement).

ture. The present Constitution does not accord the Legislature any role in the redistricting or apportionment process. Instead, like VNP's proposal, a commission is placed in charge. The commissions are materially similar. Both are charged with drawing a redistricting plan based on various guidelines. And while the guidelines have changed, as explained above, VNP's proposal actually reflects many of the same standards currently used. The major difference between the 1963 Constitution's commission and VNP's is the process by which commission members are chosen. VNP's proposal is undoubtedly more elaborate on this point. Nonetheless, as with the old commission, VNP's proposal seeks to ensure that the membership strikes a partisan balance. In fact, in doing so, VNP's proposal gives the Legislature a formal role in the process, with the majority and minority leaders of each house entitled to a certain number of vetoes on members.[164] The Legislature has no such role in the 1963 Constitution's commission. If anything, then, VNP's proposal increases, slightly, the Legislature's participation in the process over the level contemplated in 1963. And the Legislature's new, minor role does not come at the expense of either of the other two branches, which have no real part in this process.

Of course, we are not oblivious to the fact that the Legislature, since 1996, has established the standards and framework for redistricting, as well as drafted the plans.[165] But the current state of affairs is a deviation from what the voters chose when they ratified the 1963

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[164] VNP proposal, art 4, § 6(2)(E).

[165] See, e.g., MCL 4.801 (current plan for Senate districts); MCL 4.802 (current plan for House districts).

Constitution.[166] Under the 1963 Constitution, the power to draw districts never belonged to the Legislature. Rather, its present role is solely due to a judicial remedy we crafted in light of our conclusion that the unconstitutional apportionment standards the commission was directed to implement could not be severed from the commission itself.[167] Nothing about the commission was intrinsically unconstitutional. Thus, to the extent that the Legislature's power is being diminished, that power had not been granted by the

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[166] The Chief Justice's dissent also invites us to apply the repudiated concept of legislative acquiescence to the people's failure to amend the Constitution after our decision in 1982 rendering the redistricting commission ineffective. The theory of legislative acquiescence is that the Legislature, by failing to correct a judicial decision, has acquiesced in that decision. See generally *McCahan v Brennan*, 492 Mich 730, 749-750; 822 NW2d 747 (2012). The Chief Justice's dissent suggests this basic theory should be imported here, based on "the entirety of the 'indirect input' in representative self-government in which the people have been engaged during the ensuing 55 years . . . ." *Post* at 130 n 14. That is simply another way of saying that our analysis should credit the people's *inaction*—that they have somehow acquiesced in our 1982 decision. But we have rightly rejected theories of interpretation relying on acquiescence by nonaction. See *McCahan*, 492 Mich at 749-750 ("First and foremost, legislative acquiescence has been repeatedly repudiated by this Court because it is . . . an exceptionally poor indicator of legislative intent. When used in a case like this, the theory requires a court to intuit legislative intent not by anything that the Legislature actually enacts, but by the *absence* of action. Yet 'a legislature legislates by legislating, not by doing nothing, not by keeping silent.' Thus, the doctrine of legislative acquiescence 'is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence.' ") (citations omitted); see also Markman, *On Interpretation*, at 226 n 60 ("[N]o sensible theory of statutory interpretation would require Congress to devote a substantial portion of its time to extinguishing judicial forest fires."). Given that it is much more difficult for the people to directly act on this topic—i.e., amend the Constitution—their failure to act sheds even less light on the matter.

[167] See *In re Apportionment of State Legislature—1982*, 413 Mich at 116.

people through the Constitution. If anything, VNP's proposal is an attempt to correct the constitutional deficiencies so that the basic design of the 1963 Constitution—which created an independent redistricting commission—can be implemented. We cannot reasonably conclude that this effort to revivify and improve upon a feature of the present Constitution amounts to a substantial alteration in the form or structure of our government.[168]

The executive branch is not significantly affected by the proposal. Under the 1963 Constitution, the executive played no role in redistricting except for the Secretary of State's various responsibilities. Those would expand under VNP's proposal, as noted above, but not in any material respect. VNP's proposal neither adds to nor subtracts from any other responsibilities or powers of the executive branch compared to its position under the present Constitution. Any additional powers the executive might currently have—such as a veto over the Legislature's statutorily drawn redistricting—do not flow from a constitutional grant of power, but instead from the provisional situation that has been created by declaring the 1963 commission to be inseverable from the unconstitutional apportionment standards.

Finally, VNP's proposal only modestly changes the judicial branch's role in the redistricting process. The 1963 Constitution has provided this Court with jurisdiction when the commission reached an impasse,

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[168] Cf. *Laing*, 259 Mich at 217 ("Amendment implies continuance of the general plan and purport of the law, with corrections to better accomplish its purpose."); *Opinion of the Justices*, 264 A2d at 346 ("A constitutional 'amendment' was defined . . . as 'such an addition or change *within the lines of the original instrument* as will effect an improvement or better carry out the purpose for which it was framed.' ") (emphasis added), quoting *Livermore*, 102 Cal at 118-119; see also *Bess*, 985 P2d at 985 (quoting the same language from *Livermore*).

which it often did.[169] In such cases, the commission members could submit proposed plans to this Court, and we would have to select the one that best reflected constitutional requirements.[170] Additionally, the Constitution provided us original jurisdiction over applications by electors after the commission published a plan—we could then direct the Secretary of State and the commission to "perform their duties," review the commission's proposed plan, and remand the plan to the commission "if it fails to comply with the requirements of *this* constitution."[171] Thus, the Constitution offered this Court a limited array of options to review redistricting plans. VNP's proposal does likewise. In some ways, in fact, the review is slightly broader. When the original commission failed to reach agreement under the current Constitution, this Court was empowered only to select between the plans proposed by the commission members. Under VNP's proposal, we can review any challenge to a plan for compliance not only with this Constitution, but also the United States Constitution and "superseding federal law."[172] Thus, the Court would no longer have the option to choose a plan—from those presented—but it would maintain the same general powers it wielded under the 1963 Constitution as ratified.[173]

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[169] Const 1963, art 4, § 6.

[170] *Id*.

[171] *Id*. (emphasis added).

[172] VNP proposal, art 4, § 6(19).

[173] Under the present state of affairs, the Legislature has reconfirmed our "original state jurisdiction provided under section 6 of article IV of the state constitution of 1963 . . . ." MCL 4.262(3). While the statute provides a few other powers that we would lack under VNP's proposal, it must be repeated that the present system of redistricting is merely a stopgap designed to address the fact that the relevant constitutional provisions are not currently in effect. As a result, the system does not flow explicitly from the Constitution.

In sum, VNP's proposal leaves the form and structure of the government essentially as it was envisioned in the 1963 Constitution. Consequently, it is not equivalent to a new constitution and is therefore a permissible amendment under Const 1963, art 12, § 2.[174]

This conclusion finds support from a host of other considerations. It is consistent with the expectations of key members of the 1961–1962 constitutional convention, as evidenced by their discussion of the signature requirement in Article 12, § 2. During that discussion, which centered on whether to add an alternative requiring only 300,000 signatures,[175] some delegates expressed the belief that a voter-initiated amendment could be used to change the apportionment system, which was a noted problem at the convention. One delegate—referring to the United States Supreme Court's then-recent decision in *Baker v Carr*, which opened the door to constitutional challenges to redistricting[176]—thought that the initiative could be "a remedy to the problem of reapportionment."[177] Delegate Stevens, one of the leading proponents of keeping

[174] Indeed, for this reason, this proposal should be construed as an "amendment" even under the standard set forth in the Chief Justice's dissent. The dissent argues that the essential inquiry is whether the VNP proposal "fundamentally change[s] the operation of our government," *post* at 144, but as we have shown, no fundamental change is being wrought relative to what the voters themselves approved in 1963. The dissent gets around this by arguing that popular acquiescence in the provisional arrangement this Court put in place in 1982 amounts to a de facto amendment of the Constitution, but as noted earlier in this opinion, this Court has rejected acquiescence as a technique of interpreting legislative texts.

[175] See pages 73-75 of this opinion.

[176] *Baker*, 369 US at 237.

[177] 2 Official Record, Constitutional Convention 1961, p 2463 ("[I]t seemed to me that one of the important things for Michigan to pass muster is to be sure that the people have a remedy to the problem of reapportionment, and that ease of amending the constitution would be an important remedy.") (statement of Delegate Dorothy Judd).

the amendment process difficult, agreed, opining that "the initiative could be used for amending the constitution to make apportionment . . . or changing the apportionment easier."[178]

Similarly, when declaring the redistricting commission not viable in 1982, this Court suggested that our apportionment system could be addressed through an amendment to the Constitution initiated by the people.[179] Our statement, quoted above, bears repeating: "*The power to redistrict and reapportion the Legislature remains with the people*."[180] It was only because the amendment process—whether initiated by the Legislature or the people—was time-consuming that we invited the Legislature to fill the void.[181] As Justice LEVIN later explained, our approach in 1982 was based, in part, on the "assumption . . . that responsible persons would come forth and place on the ballot, and the people would adopt, new apportionment rules in time for the 1992 and 1994 elections. Indeed, that was one of the arguments for non-severability—to highlight the need for a new constitutional provision regarding legislative apportionment."[182] "The Court's exhortation," he added, "has not been heeded."[183]

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[178] *Id*. (statement of Delegate Stevens).

[179] *In re Apportionment of State Legislature—1982*, 413 Mich at 139-140. As another court similarly noted, "The makeup and apportionment of the Legislature . . . . are [questions] far better entrusted to the collective political wisdom of the Legislature *subject to* the power of initiative and referendum reserved to the people." *Silver v Brown*, 63 Cal 2d 270, 280; 405 P2d 132 (1965) (emphasis added).

[180] *In re Apportionment of State Legislature—1982*, 413 Mich at 139 (emphasis added).

[181] *Id*. at 140.

[182] *In re Apportionment of State Legislature*, 437 Mich 1208, 1211 (1990) (statement of LEVIN, J.).

[183] *Id*.

The history of our constitutional amendments, too, supports treating VNP's proposal as a proper voter-initiated amendment.[184] Most directly, the voters have in the past proposed a number of amendments dealing with apportionment,[185] including one successful amendment that, in certain circumstances, expressly stripped the Legislature of the power to redistrict. In 1952, voters initiated two competing constitutional amendments addressing apportionment.[186] The successful amendment "guaranteed the decennial reapportionment of the house of representatives substantially on a population basis, and fixed senate districts permanently in the constitution . . . ."[187] The Legislature was responsible for reapportioning the house, but, critically, if it failed to do so "in accordance with the mandate of this [constitutional] article, the board of state canvassers" was required to reapportion the districts.[188] In other words, the voters initiated an amendment that, in certain cases, eliminated the Legislature's reapportionment power and gave it to an agency in the executive branch. By comparison, VNP's proposal is more modest—the present Constitution

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[184] See Young, Jr., *A Judicial Traditionalist Confronts Unique Questions of State Constitutional Law Adjudication*, 76 Alb L Rev 1947, 1949 (2013) (noting that if doubt remains as to the meaning of a constitutional provision, courts can use "anything else that might provide an historical context").

[185] Indeed, earlier initiatives dealing with apportionment were placed on the ballot in 1924, 1928, and 1930. See Pollock, *The Initiative and Referendum in Michigan* (Ann Arbor: University of Michigan Press, 1940), pp 81-82.

[186] *Michigan: A History*, pp 548-549.

[187] Lamb, Pierce & White, *Apportionment and Representative Institutions: The Michigan Experience* (Washington, DC: Institute for Social Science Research, 1963), p 130; see also Const 1908, art 5, §§ 2 through 4 (as amended).

[188] Const 1908, art 5, § 4 (as amended).

prescribes a commission for these purposes, and VNP's amendment would retain that commission. The voters have also approved, in the past, various amendments creating commissions or affecting the powers of government at various levels and branches.[189]

Other states have created independent redistricting commissions through voter-initiated amendments, including Arizona and California.[190] And the issue of whether to create such a commission has appeared on the ballot, by virtue of the initiative process, numerous times in multiple states.[191] Similarly, citizens in several states have employed initiatives to accomplish redistricting.[192]

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[189] For example, in 1940, the people voted to amend Const 1908, art 6, to create the Civil Service Commission, which manages employment for all three branches of government. See Const 1908, art 6, § 22; Const 1963, art 11, § 5. In 1968, the people successfully amended article 6 of our Constitution to create the Judicial Tenure Commission, a body tasked with investigating instances of judicial misconduct throughout the state. See Const 1963, art 6, § 30. The people enacted the Headlee Amendment in 1978, significantly limiting the taxing powers of state and local government. See Const 1963, art 9, §§ 6, 25 through 34. Term limits for members of the Legislature, as well as the Governor, Attorney General, and Secretary of State, were established by initiative in 1992. See Const 1963, art 4, § 54; Const 1963, art 5, § 30.

[190] See *Arizona State Legislature v Arizona Independent Redistricting Comm*, 576 US ___, ___; 135 S Ct 2652, 2662; 192 L Ed 2d 704 (2015) ("Some States, in common with Arizona, have given nonpartisan or bipartisan commissions binding authority over redistricting. The California Redistricting Commission, established by popular initiative, develops redistricting plans which become effective if approved by public referendum.").

[191] Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J L & Pol 331, 343-377 (2007) (discussing in detail 12 times when the question of creating a redistricting commission was voted on as a result of voter-initiated amendments).

[192] See Miller, *Direct Democracy and the Courts* (New York: Cambridge University Press, 2009), p 151 ("In several initiative states, citizen

Our conclusion today is also reinforced by the reasoning in *Bess v Ulmer*, which addressed a similar argument concerning a similar ballot proposal.[193] In *Bess*, a "Legislative Resolve" placed a proposed amendment before the voters that would remove the reapportionment power from the executive branch (where the state's constitution had placed it) and transfer it to a "neutral body."[194] Using a test similar to what the Court of Appeals employed in this case—focusing on the quantity and quality of the proposed changes and whether the changes were few, simple, and of less importance—the Alaska Supreme Court determined that the proposal was an amendment:

> Reassigning this power is unquestionably a significant change in the present system of Alaskan government. It does not, however, deprive the executive branch of a "foundational power," and as a result does not constitute a revision. As the quantitative effect of the proposal is minimal, the qualitative force of this narrow change would have to be greater to satisfy our hybrid test. The essential function of the executive branch—to enforce the laws of the state—remains unchanged, as does its structure. No executive power is delegated to either of the other two branches. In fact, the intent of the Framers in giving the reapportionment power to the executive was primarily to prevent the abuse or neglect of that power in the hands of the legislature, rather than to safeguard a uniquely executive function.[195]

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lawmakers participated in legislative redistricting. For example, in Arizona (1918, 1932), California (1926), Colorado (1932, 1962), Oregon (1952), and Washington (1956), citizens used the initiative power either to determine district lines or to establish new criteria for the legislature to follow when drawing districts."); *id*. at 152 n 122 (noting that "[c]itizen lawmakers in two other states, Arkansas (1936) and Michigan (1952), also accomplished redistricting through the initiative process").

[193] *Bess*, 985 P2d at 981.

[194] *Id*. at 988.

[195] *Id*. (citations omitted).

In our case, the framers of the 1963 Constitution did not assign the apportionment power to any elected body, and so the effect of the changes here would be even less significant than that in *Bess*.[196]

Thus, our holding here reflects the constitutional text, our historical experience, logic, and the wisdom of other states. For all the above reasons, then, we conclude that VNP's proposal does not create the equivalent of a new constitution by significantly altering or abolishing the form or structure of our government and is, instead, a permissible voter-initiated amendment.[197]

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[196] Though *Bess* used a qualitative/quantitative test, its underlying reasoning regarding the effect of the amendment on the balance of powers is useful under the standard we adopt today.

[197] CPMC also argues, and Justice WILDER agrees in his separate dissent, that the VNP proposal cannot be put on the ballot because the proposal failed to republish "existing provisions of the constitution which would be altered or abrogated thereby . . . ." Const 1963, art 12, § 2. In particular, Justice WILDER concludes that the VNP proposal abrogates the Oath Clause, Const 1963, art 11, § 1, which states that, excepting the oath that officers will "faithfully discharge the duties" of their offices, "[n]o other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust." The VNP proposal requires applicants to "attest under oath that they meet the *qualifications* set forth in this section; and either that they affiliate with one of the two political parties with the largest representation in the Legislature . . . and if so, identify the party with which they affiliate, or that they do not affiliate with either of the major parties." VNP Proposal, art 4, § 6(2)(A)(III) (emphasis added). Because of this abrogation, according to Justice WILDER's dissent, VNP was required to republish Const 1963, art 11, § 1, and because it did not, the proposal must be kept off the ballot.

We do not agree that the VNP proposal amounts to an abrogation under Const 1963, art 12, § 2 by requiring an oath that is prohibited under Const 1963, art 11, § 1. As VNP noted in its brief, our Court addressed this basic issue in *Tedrow v McNary*, 270 Mich 332; 258 NW 868 (1935). In that case, the issue was whether the Oath Clause prohibited a statute that required candidates for a certain public office to file an affidavit or other evidence of their educational qualifications.

V. CONCLUSION

The question we face today has broad significance for the people of this state: what limitations have they placed, in the Constitution they ratified, on their power to put forward voter-initiated amendments? This question implicates some of the oldest and most perplexing problems in political theory, such as the nature of sovereignty, republicanism, and democracy. But it is not a judge's role to philosophize a theory of government. Rather, we are stewards of the people and must faithfully abide by the decisions they make through the laws they adopt. We accomplish this by adhering to the plain meaning of the text of those laws. Here, that approach leads us to conclude that a voter-initiated amendment under Const 1963, art 12,

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We upheld the requirement, observing that the Legislature could prescribe qualifications for office and that requiring proof of those qualifications, including in the form of an affidavit, "in no way conflicts with the constitutional provision." *Id*. at 335. See also *Attorney General v Macdonald*, 164 Mich 590, 593; 129 NW 1056 (1911) (holding that a residency requirement "is not 'a test,' as that word is used in the Constitution, but is rather a special qualification"). This reasoning is why, for example, *all* judicial candidates are statutorily required to complete an "affidavit . . . stating that he or she possesses the constitutional qualifications set forth in section 19 of article VI of the state constitution." MCL 168.544b. Otherwise, it would be impossible to require judicial candidates to confirm that they meet the constitutional qualifications for office. And it is also why *all* candidates for elective office in Michigan (except those running for president or vice president of the United States) are required to file an affidavit of identity. MCL 168.558. Further, as Justice WILDER notes in his dissent, there is nothing improper about inquiring into a candidate's political affiliation to determine eligibility for a bipartisan commission or board. Therefore, because the VNP proposal simply requires candidates to attest to their qualifications for a position on the commission—a requirement *Tedrow* allows—the proposal in no way "renders [the Oath Clause] wholly inoperative." *Protect Our Jobs*, 492 Mich at 773; see also *Massey v Secretary of State*, 457 Mich 410, 418; 579 NW2d 862 (1998); *Ferency*, 409 Mich at 597.

§ 2 is permissible if it does not significantly alter or abolish the form or structure of our government, making it tantamount to creating a new constitution. VNP's proposal surpasses these hurdles and is a permissible voter-initiated amendment under Article 12, § 2. Accordingly, the judgment of the Court of Appeals is affirmed. Pursuant to MCR 7.315(C)(3), the Clerk of the Court is directed to issue the judgment forthwith.

MCCORMACK, BERNSTEIN, and CLEMENT, JJ., concurred with VIVIANO, J.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from the majority's affirmance of the judgment of the Court of Appeals. The majority concludes that the proposal at issue, i.e., the Voters Not Politicians (VNP) proposal, is eligible for placement on the November 2018 election ballot by the *initiative* process of Const 1963, art 12, § 2. I dissent because I conclude that the proposal constitutes a "general revision" of the Constitution and thus is eligible for placement on the ballot only by the *convention* process of Const 1963, art 12, § 3.

I. INTRODUCTION

This case, I would emphasize, does not concern whether the VNP proposal is wise or unwise, prudent or imprudent. Nor does it concern whether the people of this state possess the ultimate authority to restructure the government of this state, for they indisputably do. Rather, it concerns only whether the VNP proposal is better understood as a constitutional "amendment," and thus eligible for placement on the ballot by the initiative process, or a "general revision" of the Constitution, and thus eligible for placement on the ballot only by the convention process.

The "people" have been referenced frequently during oral argument and by the majority opinion, as if merely to invoke their name compels the conclusion that the present measure must be placed on the ballot. However, the "people" wear many hats. The "people" invoke the initiative process, or at least 315,654 "people" do so; the "people" vote on the initiative process; "[w]e, the people" have ordained and established our Constitution, Const 1963, preamble; all political power is inherent in the "people," Const 1963, art 1, § 1; government is instituted for the equal benefit, security, and protection of the "people," *id*.; laws and ordinances issued under the Constitution define the rights and responsibilities of the "people"; and, of course, 13 "people," all randomly selected, are to sit on the commission established by the VNP proposal. After assessing the interests of the "people" in this matter, I believe that what is most significant is that these "people" have made it reasonably clear that the permanent things of *their* Constitution are not to be cast away lightly—that while ultimately the "people" do possess the authority to restructure their own charter of government, as to the most fundamentally redefining of these changes, this restructuring will be done only after the most reflective and deliberative processes of decision-making. And my further assessment persuades me that the "people" would find "fundamentally redefining" a restructuring of their Constitution that deprived them and their chosen representatives of any role in the foundational process of our system of self-government—the process by which election districts are established, citizens are joined together or separated by political boundaries, and the building blocks of our governing institutions are determined. Inserted in place is the governance of 13 randomly selected "people" entirely lacking in any democratic or electoral relationship with the other 10

million "people" of this state or their elected representatives. In the end, the "people" must be allowed to do as they see fit; they can diminish the realm of governance of their representatives (and substitute in its place an "independent" and unaccountable commission) and they can dilute the relationship between themselves and their representatives, but the "people," as I understand them to have spoken through their Constitution, have also insisted that, before a change of this magnitude takes place, a serious and considered public conversation must *first* take place, affording opportunities for sustained and focused debate, give-and-take, compromise, and modification.

Furthermore, references to the fact that the commission is to be "independent" obscures the fundamental change that the proposed measure would make to the "people's" Constitution as well; the great value of our Constitution is not the "independence" of public bodies but rather the separation of powers and the checks and balances that define relationships between public bodies and thereby limit and constrain their authority. While the VNP commission would indeed be "independent," most conspicuously, it would be "independent" of the people's representatives in the Legislature, independent of the people, and independent of the processes of self-government, especially the processes by which the "people"—in whose name both VNP and the majority purport to speak—exert their impact upon the "foundational" process of redistricting. Our constitutional heritage is poorly described by advocates of this proposal as one predicated upon the "independence" of public bodies; it is far better described as predicated upon the exercise of public authority that is limited, separated, subject to appropriate checks and balances, and accountable to the citizenry. The proposed new commission is grounded upon none of these. Whatever its

merits, the creation of this commission would effect "fundamental" change upon both our constitutional charter and the system of government operating under this charter. It thus clearly warrants the kind of careful deliberation best afforded by the processes of constitutional "revision" set forth in Article 12, § 3 of this state's Constitution.

II. BACKGROUND

The people have reserved to themselves the authority to modify the Constitution by petition and popular vote. "This Court has consistently protected the right of the people to amend their Constitution in this way, while enforcing constitutional and statutory safeguards that the people placed on the exercise of that right." *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763, 772; 822 NW2d 534 (2012). Indeed, a century ago, in *Scott v Secretary of State*, 202 Mich 629, 643; 168 NW 709 (1918), this Court stated:

> Of the right of qualified voters of the State to propose amendments to the Constitution by petition it may be said, generally, that it can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises. *But the right is to be exercised in a certain way and according to certain conditions*, the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution. [Emphasis added.]

In the instant case, we must decide whether the right is being exercised "in a certain way and according to certain conditions . . . being found in the Constitution." *Id*.

Const 1963, art 12, § 2 addresses amendments of the Constitution through the initiative process and provides:

Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.

The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. If two or

more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail.

Const 1963, art 12, § 3 addresses general revisions of the Constitution through the convention process and provides:

> At the general election to be held in the year 1978, and in each 16th year thereafter and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state. If a majority of the electors voting on the question decide in favor of a convention for such purpose, at an election to be held not later than six months after the proposal was certified as approved, the electors of each representative district as then organized shall elect one delegate and the electors of each senatorial district as then organized shall elect one delegate at a partisan election. The delegates so elected shall convene at the seat of government on the first Tuesday in October next succeeding such election or at an earlier date if provided by law.
>
> The convention shall choose its own officers, determine the rules of its proceedings and judge the qualifications, elections and returns of its members. To fill a vacancy in the office of any delegate, the governor shall appoint a qualified resident of the same district who shall be a member of the same party as the delegate vacating the office. The convention shall have power to appoint such officers, employees and assistants as it deems necessary and to fix their compensation; to provide for the printing and distribution of its documents, journals and proceedings; to explain and disseminate information about the proposed constitution and to complete the business of the convention in an orderly manner. Each delegate shall receive for his services compensation provided by law.
>
> No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to and serving in the

> convention, with the names and vote of those voting entered in the journal. Any proposed constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner and at the time provided by such convention not less than 90 days after final adjournment of the convention. Upon the approval of such constitution or amendments by a majority of the qualified electors voting thereon the constitution or amendments shall take effect as provided by the convention.

This Court has long recognized that there is a rational *distinction* between an "amendment" and a "revision." *Kelly v Laing*, 259 Mich 212; 242 NW 891 (1932); *Sch Dist of City of Pontiac v City of Pontiac*, 262 Mich 338, 345; 247 NW 474 (1933). In *Kelly*, this Court addressed this distinction in the context of proposed changes to a municipality's home-rule charter. As we then explained:

> Revision implies a re-examination of the whole law and a redraft without obligation to maintain the form, scheme, or structure of the old. As applied to fundamental law, such as a constitution or charter, it suggests a convention to examine the whole subject and to prepare and submit a new instrument, whether the desired changes from the old be few or many. Amendment implies continuance of the general plan and purport of the law, with corrections to better accomplish its purpose. Basically, *revision suggests fundamental change, while amendment is a correction of detail*. [*Kelly*, 259 Mich at 217 (emphasis added).]

Furthermore:

> *An amendment is usually proposed by persons interested in a specific change and little concerned with its effect upon other provisions of the charter*. The machinery of revision is in line with our historical and traditional *system of changing fundamental law by convention*, which experience has shown best adapted to make necessary readjustments. [*Id*. at 221-222 (emphasis added).]

Finally, we held in *Kelly* that "[b]oth from the number of changes in the charter and the *result upon the form of government*, the proposal to abolish the office of city manager requires revision of the charter and must be had by the method the statute provides therefor." *Id*. at 223-224 (emphasis added).[1]

Subsequently, in *Pontiac Sch Dist*, 262 Mich at 345, we held that a proposed amendment regarding property taxes constituted an amendment, rather than a revision, because it "*does not so interfere with or modify the operation of governmental agencies* as to render it other than an amendment by way of an addition to the Constitution." (Emphasis added.)[2]

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[1] The majority argues that *Kelly*'s discussion of the distinction between an amendment and a revision is dictum. I respectfully disagree. *Kelly* held that the proposal at issue could not be placed on the ballot because "[t]he petition on its face is not in the form required by law . . . ." *Kelly*, 259 Mich at 216. However, *Kelly* also went on to hold that the proposal could not be placed on the ballot because it was a revision rather than an amendment. *Id*. at 223-224. In other words, *Kelly* held that the proposal could not be placed on the ballot for two independent reasons. That does not mean that one of those reasons is dictum, because it is well established that "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other." *United States v Title Ins & Trust Co*, 265 US 472, 486; 44 S Ct 621; 68 L Ed 1110 (1924) (quotation marks and citation omitted). See also *Massachusetts v United States*, 333 US 611, 623; 68 S Ct 747; 92 L Ed 968 (1948) (Where a case has "been decided on either of two independent grounds" and "rested as much upon the one determination as the other," the "adjudication is effective for both."); *Richmond Screw Anchor Co, Inc v United States*, 275 US 331, 340; 48 S Ct 194; 72 L Ed 303 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion."). Furthermore, while the discussion in *Kelly* in support of the first rationale is less than two pages, the discussion in support of the second rationale is eight pages. There are no grounds for considering the first rationale binding precedent but not the second.

[2] The majority does not explain why it does not believe *Pontiac Sch Dist* to be binding precedent, other than to note that *Pontiac Sch Dist*

Thereafter, in *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 305; 761 NW2d 210 (2008) (*Citizens*), the Court of Appeals held that "in order to determine whether a proposal effects a 'general revision' of the constitution, and is therefore not subject to the initiative process established for amending the constitution, the Court must consider *both the quantitative nature and the qualitative nature of the proposed changes*." (Emphasis added.) "More specifically, the determination depends on not only the number of proposed changes, or whether a wholly new constitution is being offered, but on the *scope of the proposed changes* and the *degree to which those changes would interfere with, or*

"summarily" rejected the argument that the proposed amendment constituted a revision. Whatever the length of its analysis, *Pontiac Sch Dist* is fully consistent with the text of the Constitution, other Michigan precedent, and, indeed, as discussed later, even with the majority's application of its own standard that it adopts today. Moreover, in its discussion of this case, the majority somehow finds it relevant to observe, "[W]e decline to accept . . . that the only purpose of our constitutional provisions is to make the government run as efficiently as possible." (Quotation marks and citation omitted.) To whom exactly is the majority purporting to respond by this observation out of nowhere? Who exactly is asserting to the contrary? Certainly, no one on this dissenting opinion or in the *Pontiac Sch Dist* opinion. While the majority accuses this dissent of "labor[ing] to give its rule some provenance by repeatedly citing the age of the cases [it] relies upon," why exactly should that *not* be thought a relevant consideration? Why exactly should it *not* be thought relevant that the *best* and most *authoritative* and most *consistent* precedents of this Court and of our Court of Appeals are of a reasonably settled and longstanding character? If there is any "laboring" undertaken in our respective opinions, it seems as if the lion's share takes place within the confines of the majority opinion in distinguishing in secondary ways what are inarguably the most compelling precedents of this state—imperfect as we have acknowledged these to be. And as we have argued elsewhere, even the majority itself, by its specific inquiries into the impact of the VNP proposal, inquires of things that are largely *consistent* with these precedents, although it does so in pursuit of a new test—one that *lacks* any provenance within the judicial precedents of this state.

modify, the operation of government." *Id*. (emphasis added). The Court of Appeals ruled that the Reform Michigan Government Now! (RMGN) proposal constituted a general revision, *id*. at 307, and this Court affirmed in an order, *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 960 (2008).[3]

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[3] Justices CAVANAGH, WEAVER, and myself joined in a concurrence affirming the Court of Appeals' decision because the RMGN proposal "clearly cannot be reasonably communicated to the people in 'not more than 100 words,' " *id*. at 961 (CAVANAGH, WEAVER, and MARKMAN, JJ., concurring), while Justice WEAVER wrote a separate concurrence criticizing the Court of Appeals for reading California law into Michigan law, *id*. at 962 (WEAVER, J., concurring). Justice CORRIGAN, joined by Chief Justice TAYLOR and Justice YOUNG, wrote a concurrence in support of the Court of Appeals, *id*. at 964 (CORRIGAN, J., concurring), and Justice KELLY wrote a dissent that would have remanded to the Board of Canvassers for the submission of a 100-word statement of the purpose of the initiative, *id*. (KELLY, J., dissenting). The RMGN proposal would have effected an array of changes to the Constitution, including reductions in numbers of state legislators and judges, granting citizen standing for certain environmental lawsuits, and limiting lobbying activities.

The majority contends that this opinion "engages in revisionist legal history when it asserts that our precedents in this area have established 'longstanding standards' on this point that are 'consistent and compatible with each other, as well as with what is required by our Constitution' " because "if the standard set forth in *Laing* and *Pontiac Sch Dist* and the Court of Appeals decisions in *Citizens* and *Protect Our Jobs* was so clear and longstanding on this point, one wonders why this Court refused to adopt it in 2008 in *Citizens*, instead issuing a highly unusual order leaving this area of law in a state of limbo." While I cannot speak as to the intentions of any other justice in 2008, I *can* offer that I joined a short concurring statement in that case that held that the proposal before the Court was not an amendment under Const 1963, art 12, § 2, for what I viewed as the simplest and most straightforward of reasons—it could not be reasonably summarized in 100 words or less; it was far too expansive in its reach and impact. Nothing in that statement suggested in any way that I rejected the standard set forth in the instant case or any other standard, merely that in the context of what was then also an election emergency, there was simply no time—and even more importantly, no *need*—to assess or to apply the more nuanced and difficult standard

Most recently, in *Protect Our Jobs v Bd of State Canvassers*, unpublished per curiam opinion of the Court of Appeals, issued August 27, 2012 (Docket No. 311828), addressing whether a proposed amendment concerning collective-bargaining rights was a general revision or an amendment, the Court of Appeals reasoned that the proposed initiative was an amendment because it "is limited to a single subject matter, and it only directly adds one section to the constitution and changes one other . . . ." *Id*. at 2. The panel further held that "[t]he initiative proposal here is far more akin to a *correction of detail than a fundamental change*, when viewed in the proper context of the constitution as a whole." *Id*. at 2-3 (emphasis added). On appeal, this Court affirmed, but on wholly different grounds dealing with the republication requirement. *Protect Our Jobs*, 492 Mich 763.

III. STANDARDS

What I believe fairly can be derived from these decisions is that for at least the past 85 years in Michigan, governing law concerning direct constitutional change has been characterized by the following:

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articulated today. In the present case, on the other hand, the "100 words or less" standard is, in my judgment, the standard that is more difficult to apply and one that was not addressed by the lower court. Furthermore, given that the *Citizens* standard was derived from both *Kelly* and *Pontiac Sch Dist*, each of which constitutes binding precedent, and given that *Citizens* itself was a published opinion and thus constitutes a *further* binding precedent, the law was hardly left in any "state of limbo," *even* within the context of the difficult and exigent circumstances that the majority should well understand attend our election emergency cases. The majority also opines that the *Citizens* standard "comes from a line of California caselaw . . . ." In part, this is so, and in part, it is not, because the majority in *Citizens* largely relied on *Kelly* and *Pontiac Sch Dist*; while it did also rely on California law, it did not do so in any different manner than does the majority in the present case.

(a) *alternative* constitutional procedures exist for instituting such change and (b) determining *which* of these procedures is to be utilized in a particular instance requires an assessment of the "qualitative nature" of the proposed change—that is, the extent to which the proposal "[impacts] our form of government," entails "fundamental" change, or "would interfere with, or modify, the operation of government." While these standards have been phrased differently over time in judicial decisions, they are nonetheless consistent in supplying this common guidance.

While reasonable persons therefore may articulate these standards in slightly different ways, as indeed might the justices on this dissent, these standards are nonetheless consistent and compatible with each other, as well as with what is required by our Constitution, in distinguishing between the realms of the initiative and the convention. And while election disputes tend disproportionately to arise in the same circumstances as this case, this counsels in favor of greater rather than lesser deference to reasonably settled standards, while the majority purports to alter these standards. I say "purports" because, as discussed in further detail later, I do not believe that the majority's *application* of its standard in this case is actually all that different from these longstanding standards, only that the majority articulates its standard in a novel manner.

The Court of Appeals in the instant case purported to apply the standards set forth in *Citizens* and *Protect Our Jobs*. *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561; 922 NW2d 404 (2018) (*CPMC*). The first question then concerns whether these decisions articulated the proper standard for determining whether a proposal constitutes an "amendment" or a "revision," and I believe that they

do, although I would clarify several points. Most importantly, I believe that the ultimate judicial assessment depends most upon the *qualitative* nature of the proposed changes, i.e., whether these would "fundamentally" alter the nature or operation of our government. Although the *quantitative* nature of the proposed changes may sometimes also be relevant in this assessment, it is not determinative or even on an equal footing with the qualitative nature of the proposed changes. For example, if there were a proposal to modify all the references to "he" in the Constitution with "he or she," that would constitute a substantial quantitative change. However, it would not seemingly implicate anything fundamental in a qualitative sense, and therefore the proposal would almost certainly constitute an "amendment" rather than a "revision." On the other hand, if there were a proposal to transform the position of the governor into a lifetime appointment, although this would require relatively few textual modifications in the Constitution, such a change would be significant in a qualitative sense, and therefore the proposal would likely constitute a "revision" rather than an "amendment." Accordingly, I would clarify the focus of our caselaw to emphasize the qualitative impact of the proposed changes rather than the quantitative impact.

Similarly, I would clarify that while the sheer number of subjects to which a proposal pertains is also a relevant consideration, it is, for the same reason as just observed pertaining to the sheer number of textual changes, not necessarily a dispositive consideration. For example, if there was a proposal to change our Legislature from bicameral to unicameral, although that would relate to a single subject, it would nonetheless constitute a fundamental change to the nature and operation of our government and therefore would con-

stitute a "revision" rather than an "amendment."[4] Article 12, § 2 of Michigan's 1963 Constitution requires the ballot to contain "a statement of *the purpose* of the proposed amendment . . . ." (Emphasis added.) Because "the" is a definite article and "purpose" is a singular noun, it seems reasonably clear that this phrase "statement of the purpose of the proposed amendment" likely contemplates a single purpose. See *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Therefore, if a proposal contains multiple purposes, it would not seem to constitute an amendment under Const 1963, art 12, § 2. However, this is not the *only* constitutional limitation on the meaning of an amendment.[5] In other words, although a proposal that

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[4] Since statehood, Michigan has vested the legislative power in a bicameral legislature consisting of a Senate and a House of Representatives. See Const 1835, art 4, § 1; Const 1850, art 4, § 1; Const 1908, art 5, § 1; Const 1963, art 4, § 1. Moreover, the federal government and every state government with the exception of one also provide for a bicameral legislature. US Const, art I, § 1; see Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 Yale L & Pol'y Rev 149, 163 (1996).

[5] Indeed, the same language in Const 1963, art 12, § 2 requiring "a statement of the purpose of the proposed amendment" proceeds in the same sentence to require that this statement be "expressed in not more than 100 words," and this effectively imposes another limitation on the breadth of an amendment. In *Citizens*, 482 Mich at 960, three justices joined in asserting that "[t]his language establishes a clear limitation on the scope of constitutional amendments under § 2." In other words, a proposal that "cannot be reasonably [and presumably fully] communicated to the people in 'not more than 100 words' " cannot be considered an amendment for purposes of Const 1963, art 12, § 2. *Id*. at 961. However, the Court of Appeals in the instant case held that "[t]he above language does not impose, or even suggest, limitation on the scope of a voter initiative proposing a constitutional amendment." *CPMC*, 324 Mich App at 588. While I disagree with the Court of Appeals on that point, I *do* agree with the Court that the distinctive purposes and processes set forth by §§ 2 and 3 (amendments and revisions) further impose a limitation on the scope of proposed voter-initiated changes to our Constitution.

contains multiple purposes cannot be considered an amendment under Const 1963, art 12, § 2, a proposal that contains a single purpose is not *necessarily* an amendment under that same provision.

Article 12 of Michigan's Constitution sets forth two very different ways by which our Constitution can be directly modified.[6] One way is by the amendment process set forth in Const 1963, art 12, § 2. This process requires the supporters of a proposed amendment to obtain a certain number of signatures from registered electors of the state in order for the proposal to be placed on the ballot, i.e., "10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected," and then once it is placed on the ballot, it requires "approv[al] by a majority of the electors voting on the question . . . ." *Id*. The other way the Constitution can be directly modified is by the revision process set forth in Const 1963, art 12, § 3. This process requires a majority of electors to vote in favor of a convention; it then requires electors to choose delegates; it then requires delegates to meet, deliberate, and propose new constitutional language; and finally, it requires a majority of qualified electors to support the new or modified constitutional language.

The latter obviously sets forth a lengthier and more deliberative process. It is a process by which issues can be thoroughly discussed and debated in a structured and sustained manner, and in which proposed language can be clarified and refined. It is also a process in which give-and-take among persons of disparate view-

[6] Article 12 actually sets forth a third way by which our Constitution can be modified, i.e., an amendment by legislative proposal and a vote of electors, Const 1963, art 12, § 1, but that mode of constitutional change is not at issue in this case.

points can be pursued, proposals and counterproposals fleshed out, compromises undertaken, and risks to our historical form of government assessed and minimized. That is, it is a process considerably different from the amendment process in which voters, after a reasonably brief period of consideration (roughly 90 days in the present case), and after a very different type of public debate, must accept or reject the proposed amendment in whole. It makes sense that our Constitution would provide, and our Court would recognize, as both have for the past 85 years, that there are distinctions between "amendments" and "revisions" and that each process serves a distinctive need within our governmental and constitutional systems. The broader and the more fundamental the proposed changes, the more likely these would be of a character requiring the deliberativeness of the convention process; the more discrete and limited the proposed changes, the more likely these would be of a character requiring the expedition of the initiative process.[7]

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[7] Although I recognize that this is not a bright-line test and that reasonable people, and judges, will sometimes disagree as to whether a particular constitutional proposal does or does not call for "fundamental" change, this test nonetheless is compatible with constitutional text, our judicial precedents, and the evident purposes of the alternative processes contained in Article 12. Furthermore, this is hardly the first area of the law in which a court has been required to address whether something is "fundamental" or not. See, e.g., *AFT Mich v Michigan*, 497 Mich 197, 245; 866 NW2d 782 (2015) (stating that whether a law infringes on "fundamental rights" is relevant in the context of a substantive due-process claim); *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 326; 806 NW2d 683 (2011) (stating the same with regard to an Equal Protection Clause claim); *McBurney v Young*, 569 US 221, 226; 133 S Ct 1709; 185 L Ed 2d 758 (2013) ("[T]he Privileges and Immunities Clause protects only those privileges and immunities that are 'fundamental.' "); *Slaughter-House Cases*, 83 US (16 Wall) 36; 21 L Ed 394 (1872) (stating the same with regard to the Privileges and Immunities Clause). Principally, however, what is most important in establishing a proper judicial test is not the extent to which it avoids disagreements, or

For the reasons generally set forth in this opinion, I disagree with the majority that the standard set forth by our precedents over 85 years ago is not reasonably grounded in the text of the Constitution itself or that I myself "do[] not engage in a textual analysis of our Constitution[.]" Given that the people decided to incorporate two very different processes of modifying the Constitution, these differences must be given meaning, and one way by which to do this, in addition to assessing text and caselaw, is to examine the manifest purposes of these alternative processes in light of their respective strengths and weaknesses. Such an analysis makes reasonably clear that the people intended for broader and more fundamental changes to the Constitution to be accomplished by way of the general revision/convention process, while more narrow and discrete changes would be accomplished by way of the amendment/initiative process. This understanding is reinforced by the fact that when the people adopted the 1963 Constitution containing these alternative processes, *Kelly* and *Pontiac Sch Dist* had already been decided; therefore, the people already would have been apprised that this reflected the judicial understanding of the differences between the two processes. See *People v Nutt*, 469 Mich 565, 575; 677 NW2d 1 (2004) ("We conclude that, at the time of the ratification of our 1963 Constitution, the people of this state intended that the words 'same offense' be construed consistent with state and federal double jeopardy jurisprudence as it then existed."). In other words, this would have been the "common understanding" of the people at the time the 1963 Constitution was ratified. See *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558; 737

mechanically compels a determination, but the alignment of the test, as best as this can be done, with the underlying legal question to be resolved.

NW2d 476 (2007) ("When interpreting constitutional provisions, our primary objective is to realize the intent of the people by whom and for whom the constitution was ratified. That is, we seek the 'common understanding' of the people at the time the constitution was ratified.") (quotation marks and citation omitted).

Furthermore, I do not believe that the majority's standard is any less "vague" than the standard set forth by our precedents over the course of 85 years. Indeed, I do not believe that the majority's standard, in particular its *application* of that standard, is very much different from the standard set forth by our precedents. This is especially true when one looks to the meaning that the majority ascribes to "changes that are tantamount to the creation of a new constitution."[8] The majority articulates the standard in terms

[8] To the extent the majority holds that a proposed change must be "tantamount to creating a new constitution" in order to be considered something other than an "amendment," I strongly disagree and see no constitutional basis for this conclusion. But I see much constitutional basis for the contrary conclusion, namely, that by evaluating the distinctive elements of the initiative and convention processes, one gains reasonable insight as to the distinctive application of each, and therefore a proposal constitutes an "amendment" unless it would "fundamentally" alter the nature or operation of our government. I do not believe the majority's test is warranted by precedent or the text of the Constitution. Although *Kelly*, 259 Mich at 217, does refer to a revision in terms of creating "a new instrument," it proceeds to hold that a "revision suggests fundamental change, while amendment is a correction of detail." In addition, *Pontiac Sch Dist*, 262 Mich at 345, held that the proposed change in that case constituted an amendment because it "does not so interfere with or modify the operation of governmental agencies as to render it other than an amendment . . . ." And *Citizens*, 280 Mich App 273, and *Protect Our Jobs*, unpub op, each focused on the scope of the proposed changes and the degree to which those changes would interfere with, or modify, the operation of government. Our precedents viewed as a whole do not stand for the proposition that anything short of creating an entirely new constitution must be considered an "amendment." And although the majority's standard on its face

of whether the proposal "propose[s] changes that significantly alter or abolish the form or structure of our government in a way that is tantamount to creating a new constitution." *Kelly*, too, spoke of a revision in terms of creating "a new instrument," producing "fundamental change," and changing "the result upon the form of government . . . ." *Kelly*, 259 Mich at 217, 223-224. Similarly, *Pontiac Sch Dist* spoke in terms of whether the proposal would "so interfere with or modify the operation of governmental agencies as to render it other than an amendment . . . ." *Pontiac Sch Dist*, 262 Mich at 345.[9]

The majority, to its credit, does not hold that any changes short of a total rewrite of the Constitution can be considered an "amendment." Rather, the majority recognizes that an amendment is "limited to proposing less sweeping changes," and the majority focuses, just

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certainly appears to be in accord with this flawed proposition, reading the majority opinion as a whole, especially its actual *application* of its own standard, I do not believe this to be an accurate summation of what the majority *itself* is engaged in doing in the present case. That is, although the majority employs the "new constitution" language to describe its own standard, its actual analysis of the VNP proposal falls short of inquiring whether it would actually yield a "new constitution." There is considerable room under our Constitution between an "amendment" and the creation of an entirely new constitution.

[9] Given the resemblances between the majority's own standard (or at least its *application* of that standard) and our state's judicial precedents, it is ironic that the majority would remark that "it would be euphemistic to say that these cases have created a judicial gloss supporting the dissent's reasoning—instead, they appear to us more like a spray-on tan." The majority thus rejects the *best* and the most *enduring* relevant precedents of this state in developing its own test, disparages these precedents as tantamount to a "spray-on tan," and then, notwithstanding, proceeds reasonably to *apply* the very precedents it has both rejected and disparaged. While we respectfully disagree with the majority's ultimate conclusions, we do not find these to be indefensible or outrageous, merely less defensible and less reasonable than those reached in this dissent.

as I do, on the "qualitative" significance of the proposed changes to determine whether the changes would significantly alter our government, as the majority recognizes that "[a] constitution . . . is more than words on a page," "[i]ts most basic functions are to create the form and structure of government, define and limit the powers of government, and provide for the protection of rights and liberties," and "[t]hese are the basic threads of a constitution, and when they are removed, replaced, or radically rewoven, the whole tapestry of the constitution may change." Well said![10] Indeed, in its application section, the majority considers, just as I do, the extent to which the VNP proposal would take power away from the three different branches of government, i.e., how the proposed changes would "affect the branches' relative powers," for example, "how the proposal would change the present Constitution with regard to the Legislature," whether "[t]he executive branch [would be] significantly affected by the proposal," and how "VNP's proposal [would] change[] the judicial branch's role in the redistricting process." In other words, although the majority and I reach very different conclusions, I do not believe that our tests are all that different; we engage in similar inquiries and consider in common whether the proposed changes would fundamentally alter our system of government.

To emphasize again, it is not that the people in Michigan, if they choose to do so, cannot *radically* restructure their government by the direct processes of constitutional change (subject, of course, to federal constitutional requirements, such as the obligation of

[10] Well said, but less well applied. Does the majority not believe that the "basic threads of [*our*] constitution" might be understood as consisting in part of our system of separated powers, checks and balances, and representative self-government?

states to preserve a "Republican [or representative] Form of Government," US Const, art IV, § 4), but merely that the most *consequential* of proposed changes require greater forethought and deliberation. This is a precondition for direct constitutional change prudently recognized 100 years ago—a century before today's "emergency" decision—when this Court observed that the process of direct change must be carried out "in a certain way and according to certain conditions . . . found in the Constitution." *Scott*, 202 Mich at 643.

IV. PRESENT CONSTITUTION

In order to determine whether the VNP proposal would fundamentally alter the nature or operation of our government and Constitution, we must obviously understand the manner in which these *presently* operate. We begin with what the Constitution, ratified in 1963, originally stated, although we have not operated under that system for the past 36 years. The Constitution as ratified in 1963 called for state legislative districts to be apportioned under a weighted formula based on land area and population. Const 1963, art 4, §§ 2 and 3. It also provided that senatorial districts should be "compact, convenient, and contiguous by land, [and] as rectangular in shape as possible . . . ." Const 1963, art 4, § 2(2). In addition, house districts were to "consist of compact and convenient territory contiguous by land." Const 1963, art 4, § 3. It also established a commission on legislative apportionment "consisting of eight electors, four of whom shall be selected by the state organizations of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each appor-

tionment." Const 1963, art 4, § 6. And it provided that the commission should "receive compensation provided by law" and that the Legislature should "appropriate funds to enable the commission to carry out its activities." *Id*. With regard to this Court's involvement in redistricting, that Constitution also provided:

> If a majority of the commission cannot agree on a plan, each member of the commission, individually or jointly with other members, may submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission and published as provided in this section.
>
> Upon the application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution. [*Id*.]

However, in *Reynolds v Sims*, 377 US 533, 577; 84 S Ct 1362; 12 L Ed 2d 506 (1964), the United States Supreme Court ruled that weighted land area/population formulas violated the Equal Protection Clause and that states must "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[11] In *In re Apportionment of State*

[11] But *Reynolds* also held that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." *Id*. at 579. And the Court subsequently held that "the State's policy of maintaining the integrity of political subdivision lines" is a "rational state policy." *Mahan v Howell*, 410 US 315, 325, 328; 93 S Ct 979; 35 L Ed 2d 320 (1973). It also held that a

Legislature—1982, 413 Mich 96, 116; 321 NW2d 565 (1982), this Court held that "[t]he weighted land area/population formulae, invalidated by *Reynolds v Sims* . . . and the remaining apportionment rules of art 4, §§ 2-6, are inextricably interdependent and therefore are not severable." "Similarly, the function of the commission, which depends on those rules, and indeed the commission itself, are not severable from the invalidated rules." *Id*. Accordingly, this Court struck down both the apportionment rules and the commission itself.[12]

Subsequently, the Legislature, in 1996, enacted guidelines for the redistricting of the Senate and

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16.4% deviation from exact population equality did not violate the Equal Protection Clause if it was done in furtherance of such a rational state policy. *Id*. at 329.

[12] The majority highlights that this Court in *In re Apportionment of State Legislature—1982*, 413 Mich at 139-140, opined that "[t]he power to redistrict and reapportion the Legislature remains with the people," but that "[t]he people, however, can only exercise that power, as a practical matter, by amending the constitution . . . ." I do not disagree in any way with the proposition that the power to redistrict and reapportion the Legislature remains with the people. Nor do I disagree that the people can alter the power of redistricting by amending the Constitution. However, the issue here is whether the *specific* proposal offered by VNP does so in a manner that can be properly characterized as an amendment, as that term is used in Const 1963, art 12, § 2, a question that was obviously not considered by this Court in *In re Apportionment of State Legislature—1982*. In other words, I do not believe that *any* measure pertaining to redistricting would thereby be rendered inapt for consideration by the initiative process, only that the *particular* measure before us today does not, in my judgment, satisfy constitutional standards. For similar reasons, I do not find statements made at the constitutional convention suggesting that voter-initiated amendments could be adopted regarding redistricting to be as illuminating as does the majority. Of course, voter-initiated amendments regarding redistricting may well be compatible with *either* Const 1963, art 12, § 2 or Const 1963, art 12, § 3, for there are no limitations in these provisions concerning subject matter, cf. US Const, art IV, § 4. I simply believe that the *present* proposal is compatible only with the convention process of voter-initiated change.

House of Representatives, see MCL 4.261 *et seq*., and, in 1999, it enacted the Congressional Redistricting Act, MCL 3.61 *et seq*. Thus, after the past two federal decennial censuses, redistricting has occurred without a commission, as the Legislature has decided the districts. The commission originally formulated in the 1963 Michigan Constitution has not been active since 1972, and it has in no way been a part of that Constitution since 1982.[13]

MCL 4.261 grants the Legislature the authority to enact a redistricting plan and sets forth the guidelines that it must follow. This Court has original and exclusive jurisdiction to hear and decide all cases or controversies involving a redistricting plan. MCL 4.262(1). This Court has the authority to modify the plan or remand the plan to a special master for further action if the plan fails to comply with the statutory requirements. MCL 4.262(3). If the Legislature fails to enact a redistricting plan before the deadline, this Court has the authority to create a redistricting plan. MCL 4.263. To summarize, the redistricting commission created by the 1963 Constitution was shortly thereafter struck down and in its place the people, through their elected representatives, restored the power to redistrict back to the Legislature.[14]

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[13] I am cognizant that the commission met in 1982 and proposed redistricting plans, but this Court rejected those plans and also struck down that part of the Constitution creating the commission. *In re Apportionment of State Legislature—1982*, 413 Mich at 116.

[14] The majority asserts that "the last time the voters had *direct input* on this issue, they opted for apportionment and redistricting to be conducted by a commission." (Emphasis added.) Well, that is a finely put observation, but only if one chooses to ignore the entirety of the "indirect input" in representative self-government in which the people have been engaged during the ensuing 55 years (as well as for the previous 125 years of our state's history). During that time, the people have been free to petition or otherwise to encourage their legislators to reinstate some form of com-

V. VNP PROPOSAL

The VNP proposal would strike all that is currently in the Constitution regarding redistricting and in Article 4, § 6 would create an "independent citizens redistricting commission."[15] Article 4, § 6(1) would pro-

mission; they have been free to elect judges and justices who might reconsider the lack of constitutionality of the former commission; they have been free to call for conventions or initiatives that might propose a new form of commission; and they have been free to urge upon their representatives whatever other alternatives to the redistricting status quo they desire. Indeed, the lack of involvement of the commission during the past four redistricting cycles, and the Legislature's involvement during the past two cycles, might have been thought sufficient to prompt some or all of these actions if they had been viewed as critical by the people.

Furthermore, none of the above discussion has anything to do with "legislative acquiescence." While it is kind of the majority to cite one of my own writings in its explanation of this doctrine, and while its analysis of the doctrine seems to me correct, it is nonetheless irrelevant in the present context. If the purpose of the above discussion had been to assert that the Legislature, by failing to replace the commission struck down in 1982, had thereby shown its *opposition* to the commission, *that* would have been an exercise in the dubious assertion of "legislative acquiescence"—although even this gives short shrift to the fact that the doctrine is exclusively one of statutory interpretation and that there is no statute here whose meaning is being considered by either this dissent or the majority. Instead, the only purpose of the above discussion is to respond to the majority that the Constitution as ratified in 1963 continues in all respects to reflect the best *present* intentions of the people, despite that Constitution not having been in existence in relevant respects since 1982, and despite ample *opportunities* since then for the people to have revived or restored the commission by a variety of constitutional means.

Finally, it warrants clarification that the "direct input" in 1963 to which the majority hearkens is exactly the kind of input that this dissent would facilitate—a statewide convention—except that *this* convention, unlike that in 1963, which involved a complete rewrite of the Constitution and in which voters cast no specific vote on a redistricting commission, would focus *exclusively* upon this matter.

[15] The VNP proposal would also render all the statutes enacted by the Legislature regarding redistricting unconstitutional.

vide that the commission shall consist of 13 commissioners, each of whom would have to complete an application and attest under oath that he or she does or does not affiliate with one of the two major political parties. VNP proposal, art 4, § 6(2)(A)(III). Each commissioner would also have to:

> (B) not currently be or in the past 6 years have been any of the following:
>
> (I) a declared candidate for partisan federal, state, or local office;
>
> (II) an elected official to partisan federal, state, or local office;
>
> (III) an officer or member of the governing body of a national, state, or local political party;
>
> (IV) a paid consultant or employee of a federal, state, or local elected official or political candidate, of a federal, state, or local political candidate's campaign, or of a political action committee;
>
> (V) an employee of the Legislature;
>
> (VI) any person who is registered as a lobbyist agent with the Michigan bureau of elections, or any employee of such person; or
>
> (VII) an unclassified state employee who is exempt from classification in state civil service pursuant to article XI, Section 5, except for employees of courts of record, employees of the state institutions of higher education, and persons in the armed forces of the state.
>
> (C) not be a parent, stepparent, child, stepchild, or spouse of any individual disqualified under part (1)(B) of this section[.] [VNP proposal, art 4, § 6(1).]

In addition, "for five years after the date of appointment, a commissioner [would be] ineligible to hold a partisan elective office at the state, county, city, village, or township level in Michigan." VNP proposal, art 4, § 6(1)(E).

The Secretary of State would have to make applications available to the general public and mail these to 10,000 registered voters "selected at random." VNP proposal, art 4, § 6(2)(A)(I). The Secretary of State would then have to "randomly" select 60 applicants for each pool of affiliating applicants and 80 applicants from the pool of nonaffiliating applicants and submit these names to the majority and minority leaders of the Senate and the Speaker of the House of Representatives and the minority leader of the House of Representatives.[16] VNP proposal, art 4, § 6(2)(D). They would be able to each strike five applicants from any pool or pools, up to a maximum of 20 total strikes by the four legislative leaders. VNP proposal, art 4, § 6(2)(E). The Secretary of State would then randomly draw the names of four commissioners from each of the two pools of remaining applicants affiliating with a major party and five commissioners from the pool of remaining nonaffiliating applicants. VNP proposal, art 4, § 6(2)(F).

Article 4, § 6(5) would provide that "the Legislature shall appropriate funds sufficient to compensate the commissioners and to enable the commission to carry out its functions, operations and activities" and that "the state of Michigan shall indemnify commissioners for costs incurred if the Legislature does not appropriate sufficient funds to cover such costs." Article 4, § 6(6)

[16] "The random selection process used by the Secretary of State to fill the selection pools [would have to] use accepted statistical weighting methods to ensure that the pools, as closely as possible, mirror the geographic and demographic makeup of the state[.]" VNP proposal, art 4, § 6(2)(D)(II). How such "randomness" is to be reconciled with achieving a "mirroring" of the "geographic and demographic" makeup of the state is difficult to understand, but it is a matter not now before this Court. This "random" selection process would also be predicated on all persons *self-identifying* as either Republican, Democrat, or independent, with certain classes of persons altogether excluded from the process, including elected officials, lobbyists, and their relatives.

would provide that "the commission shall have legal standing to prosecute an action regarding the adequacy of resources provided for the operation of the commission . . . ."

Article 4, § 6(13) would provide:

> The commission shall abide by the following criteria in proposing and adopting each plan, in order of priority:
>
> (A) Districts shall be of equal population as mandated by the United States Constitution, and shall comply with the voting rights act and other federal laws.
>
> (B) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.
>
> (C) Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests. Communities of interest do not include relationships with political parties, incumbents, or political candidates.
>
> (D) Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.
>
> (E) Districts shall not favor or disfavor an incumbent elected official or a candidate.
>
> (F) Districts shall reflect consideration of county, city, and township boundaries.
>
> (G) Districts shall be reasonably compact.

"A final decision of the commission to adopt a redistricting plan [would] require[] a majority vote of the commission, including at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party." VNP proposal, art 4, § 6(14)(C).

Article 4, § 6(19) would provide:

> The Supreme Court, in the exercise of original jurisdiction, shall direct the Secretary of State or the commission to perform their respective duties, may review a challenge to any plan adopted by the commission, and shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this Constitution, the Constitution of the United States or superseding federal law. In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.

Article 4, § 6(22) would provide that "the powers granted to the commission are legislative functions not subject to the control or approval of the Legislature, and are exclusively reserved to the commission."

VI. APPLICATION

To begin with, the Court of Appeals (and now the majority) erred in assessing the nature of the change that would be effected by the VNP proposal by comparing the commission to be established by VNP with the commission created by the 1963 Constitution but thereafter struck down. In short, by the time of the Court of Appeals' asserted comparison, the commission created by the 1963 Constitution had not been a part of that Constitution for 36 years and had not actually been *used* to establish a districting plan for 46 years.[17]

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[17] Nobody would say, for example, that the congressional term limits contained in Const 1963, art 2, § 10, which were struck down by *US Term Limits, Inc v Thornton*, 514 US 779; 115 S Ct 1842; 131 L Ed 2d 881 (1995); or the three-fifths clause of US Const, art I, § 2, superseded by the Fourteenth Amendment; or Prohibition, the Eighteenth Amendment, repealed by the Twenty-First Amendment; or the Vice President runner-up rule, US Const, art II, § 1, superseded by the Twelfth Amendment; or the apportionment requirement for income taxes, US Const, art I, § 2, superseded by the Sixteenth Amendment, remain real or operative parts of a constitution simply because these defunct

The Legislature has been in charge of redistricting since at least 1996. Therefore, the pertinent question is not whether replacing the commission created by the 1963 Constitution with the VNP commission would fundamentally change the operation of government, but whether removing the power to redistrict from the Legislature and conferring that power in the VNP commission would fundamentally change the operation of government. We are obligated to consider how the government is *currently* operating in order to make the necessary comparison, not how the government might *once* have operated. And it *currently* operates (as it has almost *always* operated in the history of our state) with the Legislature responsible for redistricting.[18]

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provisions remain visible as bracketed antique pieces within their respective charters. It is sophistry to suggest that any of these nullified provisions define a charter of government to be deployed here for purposes of comparison with a proposed constitutional amendment whose legitimacy is dependent upon its *effect* on that constitution. That these provisions were *once* part of that charter does not mean that they remain so. *No* redistricting commission has been a part of Michigan's Constitution for at least 36 years. Contrary to the majority's contention, I do not believe that this Court possesses the authority to "actually amend the Constitution by deleting from it any text the [Court] declares to be unconstitutional," but who even understands what the majority is trying to say by this? It is really not complicated what this dissenting opinion has said—once this Court, or the United States Supreme Court, has struck down a provision of our Constitution, as was done in *In re Apportionment of State Legislature—1982*, 413 Mich at 116, that provision is struck down. And it is no longer a part of the Constitution. It is not, as the majority apparently believes, a part of the Constitution in abeyance, the Constitution in waiting, the backup Constitution, or the Constitution to be risen again someday. Rather, such a provision no longer has the force of law and is no longer a part of the governing charter of the state.

[18] Indeed, both before the establishment of an apportionment commission in the 1963 Constitution, dating back to 1835, and after the commission was struck down in 1982 and legislation enacted in 1996, the Legislature has always been in charge of redistricting. See Const 1835, art 4, § 3; Const 1850, art 4, § 4; Const 1908, art 5, § 4. Notably for

As this Court has recognized, "[e]lection redistricting is principally a legislative function," *LeRoux v Secretary of State*, 465 Mich 594, 619; 640 NW2d 849 (2002), redistricting "goes to the heart of the political process in a constitutional democracy," *In re Apportionment of State Legislature—1982*, 413 Mich at 136, and "[a]ny change in the means by which the members of the Legislature are chosen is a *fundamental* matter," *id*. at 136-137 (emphasis added). Indeed, one of RMGN's proposed changes would have removed from the Legislature its authority over redistricting, resituated this authority in a redistricting commission within the executive branch, and removed the procedure for judicial review of redistricting. The Court of Appeals concluded that such a proposal "affects the 'foundation power' of government by 'wresting from' the legislative branch and the judicial branch any authority over redistricting and consolidating that power in the executive branch, albeit in a new independent agency with plenary authority over redistricting." *Citizens*, 280 Mich App at 306.

The same is true in the present case. The VNP proposal would affect the "foundation" power of government by removing altogether from the legislative branch authority over redistricting and consolidating that power instead in an "independent" commission made up of 13 randomly selected individuals *who are not in any way chosen by the people, representative of the people, or accountable to the people*.[19] This, in my

purposes of the present case, the *only* period during which this power was completely taken from the Legislature and invested in a commission—*any* manner of commission, much less the specific form of commission proposed by VNP—occurred as a product of the convention process, not the initiative process.

[19] The Court of Appeals held that the VNP proposal would not wrest *complete* power from the legislative branch because "the Legislature

judgment, reflects a fundamental alteration in the relationship between the people and their representatives. Instead of 10 million Michigan citizens possessing some measure of influence over the system by which election districts are established in this state and citizens joined together or separated by political boundaries and the building blocks of our governing institutions determined, the VNP proposal would substitute the decision-making of 13 randomly selected citizens. And instead of the democratically elected representatives of these 10 million people having a constitutional role in this same process, the VNP proposal would substitute the decision-making of these self-same randomly selected citizens. And thus instead of this "foundation" power of redistricting being carried out by traditional institutions of American self-government, it will instead be carried out by an "inde-

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retains the power to veto potential commission members . . . ." *CPMC*, 324 Mich App at 596. More precisely, the VNP proposal would allow 4 members of the Legislature to remove 5 applicants each from the pool of 200 applicants. I would not describe this authority as constituting an effective "legislative veto," much less an example of how the Legislature retains meaningful power over the commission. In addition, although the Court of Appeals is correct that the VNP proposal would not wrest complete power from the judicial branch, it *would* wrest from the judiciary its power to create its own redistricting plan. While I do not necessarily view this as a "bad" alteration of the Constitution, that is not the issue. Rather, it is whether this can be understood to constitute a "fundamental" reform of the Constitution. The majority does not answer this but instead concludes that the "Constitution offered this Court a limited array of options to review redistricting plans" and "VNP's proposal does likewise." However, the part of the "Constitution" that the majority refers to here is exactly that part that has been *struck down* by this Court. In other words, instead of comparing the VNP proposal to existing laws that currently define this Court's authority with regard to redistricting, the majority compares the VNP proposal to an obsolete part of the 1963 Constitution, that is, a provision that for at least the past 36 years has been a *non-part* of that or any other constitution.

pendent" commission, utterly removed from the processes of self-government.

Furthermore, although this commission would nominally be placed within Article 4, describing the legislative branch of government, and invested with the legislative power of redistricting, it would nonetheless be "independent" from the Legislature. See VNP proposal, art 4, § 6(22) ("[T]he powers granted to the commission are legislative functions not subject to the control or approval of the Legislature, and are exclusively reserved to the commission."). For that reason, it is incumbent on VNP to redefine, as it does, the threshold description of the "legislative power" in Article 4, § 1. That language now reads, "The legislative power of the State of Michigan is vested in a senate and a house of representatives." It would be modified to read, "*Except to the extent limited or abrogated by* [the VNP proposal], the legislative power of the State of Michigan is vested in a senate and a house of representatives." (Emphasis added.) This is a change occasioned by the fact that one of the Constitution's three separated powers, the "legislative power," would be exercised by a body that is *neither* the "senate" nor the "house of representatives," but an "independent" commission. While this new language might avoid what would otherwise be an unconstitutional exercise of authority by the commission, that is *only* because such language alters the Constitution's fundamental expression of the legislative power.

Indeed, the proposal goes on to introduce the same prefatory language in Articles 5 and 6 of the Constitution, addressing respectively the executive and judicial powers of the Constitution,[20] each of which hitherto

[20] Const 1963, art 5, § 1 would be modified to read, "*Except to the extent limited or abrogated by* [the VNP proposal], the executive power is vested in the governor," and Const 1963, art 6, § 1 would be modified

has remained essentially unchanged since our state's first constitution in 1835. All of which merely underscores that the impact of these changes is quite "fundamental." While it is reasonably clear that the new prefatory language set forth in Article 6 is designed to communicate that current understandings of the "judicial power" are somehow to be altered, at a minimum by striking the present authority of the judiciary to initiate redistricting plans where necessary,[21] it is less clear why the prefatory language set forth in Article 5 is similarly required, although it must be presumed that this is because alterations in the exercise of the executive power are also contemplated, possibly in the extent of the executive's ability to exercise its present veto authority[22]

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to read, "*Except to the extent limited or abrogated by* [the VNP proposal], the judicial power of the state is vested exclusively in one court of justice . . . ." (Emphasis added.) Taken together, these redefinitions of the foundational articles and sections of our system of separated powers speak eloquently concerning the breadth of the changes being enacted by the VNP proposal. While the proposed changes may or may not ultimately prove sensible or prudent, they will almost certainly prove consequential, and *that* is what is at issue.

[21] Furthermore, the VNP proposal would require the commission to consider such factors as a "state's diverse population and communities of interest," which would include, but not be limited to, "populations that share cultural or historical characteristics or economic interests." VNP proposal, art 4, § 6(13)(C). The commission would also be required to "not provide a disproportionate advantage to any political party," which would be determined by using "accepted measures of partisan fairness." VNP proposal, art 4, § 6(13)(D). And the commission would be required to "not favor *or* disfavor an incumbent elected official or a candidate." VNP proposal, art 4, § 6(13)(E) (emphasis added). Moreover, this Court somehow would be required to review and ensure that the commission had complied with each of these "criteria" in its adoption of redistricting plans. Contrary to the majority's contention, the plain language of these criteria in no way resembles those criteria applicable to the short-lived 1963 constitutional commission or the criteria by which the Legislature currently abides.

[22] An authority wrongly characterized by VNP as a "legislative power" in its briefing to this Court.

or its general supervisory authorities over the so-called administrative branch of government. I do not know exactly what was in the mind of the drafters of the VNP proposal in these regards, but we soon will doubtlessly be apprised of this in the course of litigation seeking to make clear how truly "independent" the VNP commission is of all checks and balances, and restraints, of the sort imposed upon every other institution of government. Whereas descriptions of the administrative state as a "fourth branch" may heretofore have been exaggerated, it is difficult to survey the express authorities and the constitutional placement of the VNP commission and not conclude that it is designed to be an "independent" body of a genuinely unique character.

In sum, Article 4, § 1, Article 5, § 1, and Article 6, § 1, the foundational articles of our system of separated powers, have each been modified in recognition of the authority bequeathed upon the new commission. While lawyers, scholars, and public officials may now be increasingly engaged in reconsidering the proper expanse of the administrative state—its impact upon our three branches, understandings of governmental accountability to the citizenry, and the rule of law—Michigan now embarks upon the establishment of a super-administrative, or "independent," commission to carry out the foundational role of self-government. This measure is precisely of a kind that warrants the reflection, deliberation, and consensus decision-making of the convention processes of Const 1963, art 12, § 3.[23]

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[23] The majority contends that it is appropriate to treat the VNP proposal as a voter-initiated "amendment" under Const 1963, art 12, § 2, in part, because in 1952 a voter-initiated amendment modified the Constitution to provide that "should the legislature within [a certain period of time] fail to apportion anew the representatives in accordance with the mandate of this article, the board of state canvassers, within [a

What these three "[e]xcept to the extent limited or abrogated by" provisions most of all suggest is that the commission itself is an entirely novel institution that would fundamentally breach our Constitution's separation of powers, see Const 1963, art 3, § 2 ("The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."), *but for* the addition of these three provisions. Why would it be necessary to expressly redefine the wielder of each of our Constitution's three separated powers *unless* the VNP proposal was thought to implicate each of these?[24] Yet, to the

certain period of time,] shall apportion anew such districts in accordance with the provisions of this article . . . ." Const 1908, art 5, § 4. Putting aside for the moment the vast differences between these two proposals, the 1952 proposal was, to the best of my knowledge, never *challenged* on the basis that it was not a proper voter-initiated "amendment." The majority rejects proper judicial precedents in defining a standard for the consideration of voter-initiated amendments while invoking nonprecedents for illustrating what does and does not satisfy its own standard. Furthermore, the 1952 proposal was vastly different from the instant proposal. The 1952 proposal gave the power of redistricting to the board of state canvassers *only* if the Legislature failed to timely exercise that power, while the instant proposal would take the power of redistricting completely away from the Legislature and place it in the hands of an unprecedentedly "independent" redistricting commission.

[24] Indeed, even the majority admits that "by adding this language, the proposal makes explicit what would have been implicit without the language—the proposal does have some effect on the responsibilities and powers of the branches of government," but that effect, according to the majority, does not amount to a "substantial alteration in the form or structure of our government." To say the least, I disagree with this latter conclusion and note that it is only reached after a comparison with a long-defunct commission that for a short time was part of the Constitution but has not been for at least 36 years and has not been operative for nearly half a century. In order to assess the impact of a proposed constitutional change, and by that assessment determine whether the proposal effects a "fundamental" change or a change in accordance with

extent that the commission *would*, in fact, wield these combined powers, it would not only be a unique constitutional institution, but in express breach of Const 1963, art 3, § 2, one of the several constitutional provisions *not* republished by VNP proponents. See note 27 of this opinion. Thus, this VNP commission would be as close to representing a "fourth branch" of government as any within our Constitution—an "independent" body certainly, but more relevantly for purposes of constitutional analysis, an "unaccountable" body.[25] The present issue, once again, is not the *wisdom* of the changes being made by the VNP proposal, but whether these changes are *fundamental*. I believe that they are, even by the most rigorous understanding of what is and is not "fundamental" to our constitutional system of governance.[26]

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the majority's own standard, the majority would do better to compare the proposal with the *actual* Constitution than to the once-upon-a-time constitution that produces the most favorable comparison. "Changes" are generally assessed by how the *present*, the *status quo*, the *current* moment, the *here-and-now* is being affected by some new development, not by the irrelevant comparison engaged in by the majority. Accordingly, the majority does not address the critical question, which is whether the VNP proposal would fundamentally alter the government as it *currently* operates. Perhaps if the majority would have addressed this question, it would have agreed with this dissent that the proposal *does* fundamentally alter the government as it now operates. Finally, to be clear, I do not agree with the majority's comparison, even on its own terms. That is, the 1963 commission and the VNP commission bear little serious comparison with one another in terms of their scope, their "independence," and their relationship with either the other institutions of government or the "people" themselves.

[25] "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison) (Rossiter ed, 1961), p 301.

[26] Concerning the quantitative nature of the changes effected by the VNP proposal, it would alter 11 sections within 3 articles of the

VII. CONCLUSION

For these reasons, I conclude that the VNP proposal, if adopted, would fundamentally change the operation of our government and, as a result, it is not an "amendment" that can be properly placed on the ballot by the initiative process under Const 1963, art 12, § 2, but rather a general "revision" that requires resort to the convention process under Const 1963, art 12, § 3.[27]

Constitution, and it would add more than 3,000 words to the Constitution while deleting more than 1,000 other words. While I am not of the view that there is some numerical threshold beyond which a proposal cannot qualify for ballot placement as an initiative, these figures concerning the VNP proposal certainly demonstrate a considerable quantitative effect on the Constitution.

[27] Plaintiffs also argue that petition supporters (VNP) did not "comply with the requirement that the petition republish any existing constitutional provision that the proposed amendment, if adopted, would alter or abrogate." *Protect Our Jobs*, 492 Mich at 778; see also Const 1963, art 12, § 2; MCL 168.482(3). Because I conclude that the proposal constitutes a revision rather than an amendment, and thus cannot be placed on the ballot for that reason, it is unnecessary for me to address this argument. However, I do question whether VNP has fully complied with the republication requirement, and this *is* a necessary matter for consideration by the majority that would place the VNP proposal on the ballot. In particular, Const 1963, art 9, § 17 provides, "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." Yet, the VNP proposal would require that "[t]he state of Michigan . . . indemnify commissioners for costs incurred *if the Legislature does not appropriate sufficient funds* to cover such costs." VNP proposal, art 4, § 6(5) (emphasis added). Would this provision require money to be paid out of the state treasury absent an appropriation? If so, Const 1963, art 9, § 17 should have been republished and it was not. For reasons set forth earlier in this opinion, I also question whether Const 1963, art 3, § 2, setting forth the separation-of-powers principle of our state's Constitution should not have been republished. Finally, I question whether Const 1963, art 11, § 1 should have also been republished. It provides:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States

It is precisely the kind of "alteration of first governing principles" proposal that requires the opportunities for debate, modification, give-and-take, and compromise that are only available in the convention process. It is not the kind of proposal that the electorate should be required to "take or leave" as they cast their votes over the course of the next 90 days after digesting a "100-word or less" summary. That is, it is not the kind of proposal under our Constitution that is appropriate for the "amendment" process. Therefore, I respectfully dissent from this Court's decision to affirm the judgment of the Court of Appeals.

ZAHRA and WILDER, JJ., concurred with MARKMAN, C.J.

WILDER, J. (*dissenting*). I concur in full with Chief Justice MARKMAN's dissent. I write separately, however, to address an additional, alternative basis for rejecting the proposal submitted by Voters Not Politicians (VNP). The VNP proposal requires that applicants to the independent citizens redistricting commission attest under oath either that they affiliate or do not affiliate with one of the two major political

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> and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability. *No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust.* [*Id.* (emphasis added).]

Yet, the VNP proposal would require "applicants to *attest under oath* that they meet the qualifications set forth in this section; and either that they affiliate with one of the two political parties with the largest representation in the Legislature (hereinafter, 'major parties'), and if so, identify the party with which they affiliate, or that they do not affiliate with either of the major parties." VNP Proposal, art 4, § 6(2)(A)(III) (emphasis added). Would this provision require an *additional* oath as a qualification for any office or public trust? If so, Const 1963, art 11, § 1 should also have been republished and it was not. Thus, three significant constitutional provisions should arguably have been republished, and they were not.

parties. Because the proposal abrogates the Oath Clause of Const 1963, art 11, § 1, which forbids requiring additional oaths or affirmations as a qualification for public office, VNP was required to republish that provision on its petitions. It is uncontested that VNP failed to do so. Because strict compliance with the republication requirement was required, an order of mandamus should issue directing the rejection of the VNP proposal.[1]

I. THE VNP PROPOSAL[2]

The VNP proposal, art 4, § 6, provides, in pertinent part:

> (2) Commissioners *shall be selected* through the following process:
>
> (A) The Secretary of State shall do all of the following:
>
> * * *
>
> (III) require applicants to *attest under oath* that they meet the qualifications set forth in this section; *and either that they affiliate with one of the two political parties with the largest representation in the Legislature (hereinafter, "major parties"), and if so, identify the party with which*

[1] Appellants raised three additional constitutional provisions that they claim would be abrogated by the VNP proposal and were not republished with the circulated VNP petition: Const 1963, art 9, § 17 (concerning appropriations); Const 1963, art 1, § 5 (concerning free speech); and Const 1963, art 6, § 13 (conferring original jurisdiction on the circuit courts). Because I believe that substantial questions have been raised regarding the abrogation of Const 1963, art 11, § 1, and that this abrogation appears to be sufficient by itself to reverse the decision of the Court of Appeals, I do not address the other three constitutional provisions.

[2] In the proposal, language being added to the Constitution is shown in all capital letters. That capitalization has been altered when quoted in this opinion to make reading the proposed language easier.

> *they affiliate, or that they do not affiliate with either of the major parties*. [Emphasis added.][3]

Under the VNP proposal, the Secretary of State is required to eliminate the applications that are incomplete. Therefore, if an applicant fails to attest under oath regarding his or her political party affiliation, the applicant is ineligible to be selected for a position on the commission. See VNP proposal, art 4, § 6(2)(D)(I).

II. BACKGROUND REGARDING REPUBLICATION REQUIREMENTS

Both Const 1963, art 12, § 2[4] and MCL 168.482(3)[5] require that ballot proposals that would amend Michigan's Constitution republish any existing constitutional provisions that the proposed amendment would alter or abrogate. The petition republication requirement serves "to inform the petition-signer, should he

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[3] The commissioner qualifications are listed in VNP proposal, art 4, § 6(1). "Each commissioner shall" be registered to vote in Michigan, otherwise not disqualified for appointed or elected office by the Michigan Constitution, and not currently, or in the past 6 years have been (or related to anyone who has been) (1) a declared candidate, elected official, or part of a governing body for federal, state, or local office; (2) a paid consultant or employee of any elected official, political candidate, or political action committee; (3) a legislative employee; (4) a registered lobbyist; or (5) an unclassified state employee.

[4] Const 1963, art 12, § 2 provides that petitions "shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." That section subsequently provides that "[s]uch proposed [constitutional] amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law." *Id*.

[5] MCL 168.482(3) provides, in relevant part:

> If the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provisions to be altered or abrogated shall be inserted, preceded by the words:
>
> "Provisions of existing constitution altered or abrogated by the proposal if adopted."

sign," of the effect "an initiated proposal will have upon an existing constitutional provision (or provisions) should that proposal receive electoral approval." *Carman v Secretary of State*, 384 Mich 443, 454; 185 NW2d 1 (1971) (emphasis omitted). Such "dissemination of necessary information to the public" is considered both "wholesome and desirable." *Id*. "Const 1963, art 12, § 2 and MCL 168.482(3) together establish the requirements for publishing existing constitutional provisions." *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763, 778; 822 NW2d 534 (2012).

In *Stand Up For Democracy v Secretary of State*, 492 Mich 588; 822 NW2d 159 (2012), this Court held that a petition must fully observe mandatory statutory provisions concerning a petition's form requirements. In *Protect Our Jobs*, 492 Mich at 778, this Court held that the strict-compliance principle articulated in *Stand Up For Democracy* applied with "equal force" to the requirement that a petition republish any existing constitutional provision that the proposed amendment, if adopted, would alter or abrogate.

Protect Our Jobs, which involved the proper interpretation of "alter" and "abrogate" in the context of a ballot proposal to amend the Constitution, *id*. at 772-773, reaffirmed the principles articulated in *Ferency v Secretary of State*, 409 Mich 569; 297 NW2d 544 (1980), and *Sch Dist of City of Pontiac v City of Pontiac*, 262 Mich 338; 247 NW 474 (1933), *Protect Our Jobs*, 492 Mich at 778-781. "[A]n existing provision is only altered when the amendment actually adds to, deletes from, or changes the wording of the provision," and "an amendment only abrogates an existing provision when it renders that provision *wholly inoperative*." *Protect Our Jobs*, 492 Mich at 773 (emphasis added).

With respect to abrogation—the only type of change asserted to be at issue by plaintiffs in the instant case—*Protect Our Jobs* held that republication is required if the proposed change "would essentially eviscerate an existing provision." *Id*. at 782. The standard for abrogation was articulated as follows:

> Our caselaw establishes that an existing provision of the Constitution is abrogated and, thus, must be republished if it is rendered "wholly inoperative." An existing constitutional provision is rendered wholly inoperative if the proposed amendment would make the existing provision a nullity or if it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together. That is, if two provisions are incompatible with each other, the new provision would abrogate the existing provision and, thus, the existing provision would have to be republished. An existing provision is not rendered wholly inoperative if it can be reasonably construed in a manner consistent with the new provision, i.e., the two provisions are not incompatible.
>
> Determining whether the existing and new provisions can be harmonized requires careful consideration of the actual language used in both the existing provision and the proposed amendment. An existing provision that uses nonexclusive or nonabsolute language is less likely to be rendered inoperative simply because a proposed new provision introduces in some manner a change to the existing provision. Rather, when the existing provision would likely continue to exist as it did preamendment, although it might be affected or supplemented in some fashion by the proposed amendment, no abrogation occurs. *On the other hand, a proposed amendment more likely renders an existing provision inoperative if the existing provision creates a mandatory requirement or uses language providing an exclusive power or authority because any change to such a provision would tend to negate the specifically conferred constitutional requirement.* [*Id*. at 782-783 (citations omitted; emphasis added).]

Protect Our Jobs involved four distinct ballot proposals to amend the Michigan Constitution, none of which altered an existing provision of the Constitution. However, the Court held that the ballot proposal at issue in *Citizens for More Michigan Jobs v Secretary of State* abrogated an existing constitutional provision. *Id*. at 773. That proposed amendment would have allowed for the construction of eight new casinos in Michigan and would have compelled the issuance of a liquor license to each of the eight casinos. *Id*. The Court held that the amendment's requirement that the casinos "shall be granted" liquor licenses "render[ed] wholly inoperative the 'complete control of the alcoholic beverage traffic within this state' afforded to the Liquor Control Commission under . . . Const 1963, art 4, § 40." *Id*. Because Article 4, § 40 was required to be republished, the fact that it was not was "fatal to the proposed amendment" and mandamus was denied. *Id*. at 791.

III. THE OATH CLAUSE

Const 1963, art 11, § 1 provides:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability. *No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust.* [Emphasis added.][6]

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[6] There is no question that the VNP proposal contemplates that redistricting commissioners would hold "office." See VNP proposal, art 4, § 6(3) (stating that "commissioners shall hold *office* for the term set forth in part (18) of this section" and that "[a] commissioner's *office* shall

Throughout Michigan history, this constitutional provision has largely remained the same. Const 1835, art 12, § 1; Const 1850, art 18, § 1; and Const 1908, art 16, § 2 all provided that "[n]o other oath, declaration or test shall be required as a qualification for any office or public trust." Const 1963, art 11, § 1 narrowed the provision from "test" to "any religious test."

In *Dapper v Smith*, 138 Mich 104; 101 NW 60 (1904), the issue before the Court was the constitutionality of a Kent County law that denied a spot on the ballot to any candidate unless the candidate declared an oath of the fact that he was a candidate for the office. The oath prohibited voters from choosing a candidate who declined to seek office on his own initiative but was "willing to consent to serve his State or his community in answer to the call of duty when chosen by his fellow citizens to do so . . . ." *Id*. at 105. The Court noted that the constitutional provision was "not one designed for the benefit of the aspirant for public station alone; it is in the interest of the electorate as well." *Id*. The Court found the law was unconstitutional, in violation of Article 18, § 1, which provided that "no other oath, declaration, or test shall be required as a qualification for any office or public trust." *Id*. at 105-106. The Court could not "escape the conclusion that the provision in question does most seriously impede the electors in the choice of candidates for office, *and that it is in conflict with the provisions of section 1 of article 18 of the Constitution*." *Id*. (emphasis added).

In *Harrington v Secretary of State*, 211 Mich 395, 395-396; 179 NW 283 (1920), the Court relied on

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become vacant upon the occurrence of any of the following," including "gross misconduct in *office*" and "inability to discharge the duties of *office*") (emphasis added).

Dapper to strike down a statutory amendment that required primary candidates to sign an affidavit stating that the candidate was a member of a certain political party, naming the political party, and indicating that the candidate would "support the principles of that political party of which he is a member, if nominated and elected[.]" (Quotation marks and citation omitted.) The Court noted the fallacy of requiring additional oaths before a candidate even becomes a candidate: "Where is the logic of saying that when elected the officer cannot be subjected to any test oath other than the constitutional oath of office, but before he can be a candidate he must subject himself to a different test oath or he cannot be a candidate, and is therefore in practical effect barred from holding the office?" *Id*. at 397. The Secretary of State urged that *Dapper* be overruled, but the Court declined, concluding that "the amendment contravenes the constitutional provision above quoted." *Id*. at 399.

IV. ANALYSIS

In the instant case, the Court of Appeals panel agreed with plaintiffs that the VNP proposal is "not an oath of office, but is merely an affirmation that the applicant satisfies the commissioner qualifications, which are enumerated in a separate section, § 6(1)," reasoning that *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 465, 510; 242 NW2d 3 (1976), supported this conclusion. *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 610; 922 NW2d 404 (2018) (*CPMC*). In that case, the Court held that a financial disclosure oath did not violate Article 11, § 1; rather, it was more akin

to nominating petition affidavits under MCL 168.558 and former MCL 168.557. *Advisory Opinion*, 396 Mich at 510-511. However, the plain language of the VNP proposal requires applicants to attest under oath that they meet the qualifications "set forth in this section; *and*" indicate their party affiliation, if any. VNP proposal, art 4, § 6(2)(A)(III) (emphasis added). The political party affiliation question is undoubtedly a requirement of the attestation under oath in addition to the qualifications of § 6(1). The Court of Appeals, without explanation, simply declared that a financial disclosure oath is analogous to a political affiliation attestation, and in doing so, it ignored language from *Advisory Opinion* that distinguished *Dapper* and *Harrington* and is particularly germane to this case:

> Essentially in both *Dapper v Smith* and *Harrington v Secretary of State*, the Court upheld the right of belief of the citizen *in the face of the government attempt to force the citizen to make a decision*. In *Harrington*, the Court held that the government could not force a potential candidate to choose a political philosophy. In *Dapper*, *the potential candidate could not even be forced to decide if he wanted to be a candidate*. The situation we have in this case is vastly different from that in *Dapper* and *Harrington*. Sections 131 and 132 [of 1975 PA 227] *do not require the potential candidate to form a belief or choose between differing thoughts*. The financial disclosure requirements are not analogous to the filing of an oath, affirmation, or religious test. We believe they are more analogous to affidavits required by MCLA 168.557 (change of name) and MCLA 168.558 (name, address, residency, etc.). We find no violation of art 11, § 1 by §§ 131 and 132. [*Advisory Opinion*, 396 Mich at 510-511 (citations omitted; emphasis added).]

In this case, the Court of Appeals' analysis made no reference to *Dapper* whatsoever. Moreover, the panel distinguished *Harrington* on the basis that in its view,

"the oath required by the VNP Proposal relates only to the information on the application and *does not bind a candidate once he or she becomes a commissioner*." *CPMC*, 324 Mich App at 611 (emphasis added). However, whether the oath in the instant case, unlike *Harrington*, does not purport to bind a candidate into the future has no bearing on whether an oath or affirmation exists as a qualification for office in the first instance. Nothing in the language of Article 11, § 1 limits the provision to "binding" oaths, affirmations, or religious tests.[7] Rather, the language of Article 11, § 1 bars additional oaths or affirmations as a *requirement* for office—"[n]o other oath, affirmation, or any religious test shall be required *as a qualification* for any office or public trust." (Emphasis added.)

The plain language of the VNP proposal requires applicants to make a choice when filling out the application—they must attest under oath that they affiliate with the Democratic Party, or Republican Party, or indicate that they affiliate with neither party. If the applicant fails to meet this qualification, the application is discarded and the applicant is rendered categorically ineligible for a commissioner position. As this Court stated in *Advisory Opinion*, *Dapper* and *Harrington* stand for the proposition that Article 11, § 1 precludes *any* requirement that requires a potential candidate to form a belief or choose between differing thoughts as a qualification for office. Under

[7] While VNP's oath does not purport to bind a candidate's political affiliation into the future, we note that it would defeat the stated purpose of this independent "non-partisan" commission if it were to be dominated with commissioners from one side of the political aisle simply because misrepresentations were made during the application process. An enduring oath would preclude this from occurring and would be consistent with the stated purposes of VNP.

Dapper and *Harrington*, commissioner applicants may not be forced to attest, under oath, to which political party they most closely affiliate with, if any.

VNP cites two cases for the proposition that "appointment to public bodies" may be based upon "consideration of political affiliation in cases where the requirement in question is designed to ensure representation of diverse political interests, and does not exclude persons of any particular political persuasion from participation." In other words, defendants argue that the plain language of Article 11, § 1 may be set aside in the interests of political diversity. However, these cases are easily distinguishable.

VNP first cites *Attorney General ex rel Connolly v Reading*, 268 Mich 224; 256 NW 432 (1934). In that case, electors of the city of Detroit sought a writ of mandamus to compel the city election commission to comply with a law requiring that not more than 50% of the election inspectors be of the same political party. *Id*. at 226. The election commissioners refused to comply with the law, claiming that it was an unconstitutional test.[8] *Id*. The Court rejected the commissioners' argument. *Id*. at 232. In doing so, the Court quoted Volume 20 of the Corpus Juris, which (citing *Attorney General v Bd of Councilmen of the City of Detroit*, 58 Mich 213; 24 NW 887 (1885)) stated that " 'such provisions have been held unconstitutional as making political opinions a condition to holding public office, but in [other jurisdictions] where the question has been raised it has been held that such provisions do not establish such a political test of office as is

[8] As noted above, Article 16, § 2 of the 1908 Constitution then provided, "No other oath, declaration or test shall be required as a qualification for any office or public trust." The provision has since been amended to limit "*test*" to "*any religious test*."

repugnant to the Constitution but . . . *rather a rule for the guidance of the appointing power*.' " *Id*. at 227-228 (emphasis added). The Court distinguished the statutory language pertaining to election inspectors from the language at issue in the Corpus Juris, *Dapper*, and *Harrington*, but found it "identical" to the language in numerous other statutes creating various other boards. *Id*. at 228-229. Instead of requiring a person to declare a party affiliation in order to be an election inspector, the statute was similar to other statutes requiring "that candidates for election to any certain public office shall be limited to a certain number from each political party." *Id*. at 231.[9]

Connolly thus had nothing whatsoever to do with oaths or affirmations—the language of the statute at issue did not require anyone to make an oath or affirmation—and the case does not support VNP's claim that its proposal does not abrogate Article 11, § 1.

The other case cited by defendants is *Attorney General ex rel Fuller v Parsell*, 99 Mich 381; 58 NW 335 (1894). In that case, the attorney general filed a quo warranto action against Eugene Parsell, the warden of the state house of correction and reformatory at Ionia. *Id*. at 382. Parsell refused to give up his office even after he was removed by the board of control.[10] *Id*.

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[9] In light of the language of Const 1963, art 11, § 1 being changed from "test" to "any religious test," I believe that it is perfectly permissible to inquire about political affiliation, particularly for a bipartisan board position. What does not appear to be permissible, and appears incompatible with the plain language of Article 11, § 1, is requiring an *oath* concerning political affiliation.

[10] A new warden, Otis Fuller, had been appointed by the board, and Fuller had to file a writ of mandamus against the attorney general to force the filing of a quo warranto action against Parsell. See *Fuller v Attorney General*, 98 Mich 96; 57 NW 33 (1893).

Parsell raised six points in defense of the quo warranto action against him; the second point is the one most relevant to this case and reads as follows:

> In his second rejoinder he alleges, substantially, that after the passage of Act No. 118 [of the Public Acts of 1893], the Governor, by virtue of said act, assumed to appoint the board of control, requiring of each member thereof the political test named and mentioned in section 2, and by reason thereof appointed two Republicans and one Democrat,—the said Governor himself being *ex officio* member of said board, and also being a Republican,—and that the said Governor would not have appointed the Democratic member of said board had he been a Republican, or the Republican members had they been Democrats, but that he made said appointment of these parties upon said board because of their political belief and for political reasons; and as to this the respondent puts himself upon the country. [*Id*. at 383-384.]

The Court rejected his claim as follows:

> The issue made by the second rejoinder is one purely of law, and raises the question of the constitutionality of Act No. 118, Laws of 1893. The constitutionality of the act was passed upon in *Fuller v Attorney General*, and the act held valid. It is true the exact point made here was not presented in that case, but we see no reason for holding it unconstitutional for the reasons assigned. It is now contended that because the Governor, in making the appointments on a new board, acting under section 2 of the act, appointed from each political party, such appointments are void. That section provides that the board shall consist of three members, to be appointed by the Governor, and not more than two of such members so appointed shall be of the same political party. The Governor, by the same section, is made *ex officio* member of the board. This provision of the act, we think, was passed for a salutary purpose, and was within the province of the Legislature. We know of no provision of the Constitution of the State which it violates. The Governor was bound by this section to appoint each

> member of the board, and, in making the selection, to choose no more than two from the same political party. This provision was carried out, as admitted by the respondent. It is true that the appointments may have been made for political purposes, and because of the political beliefs of the parties appointed; but this could not make the appointments void, and no issue of fact could be framed thereon. But, if this were not so, the title to their office cannot be attacked here. They are at least *de facto* officers. [*Id*. at 387-388.]

Of interest, it should be noted that Parsell did not claim a violation of Const 1850, art 18, § 1, the predecessor of Const 1963, art 11, § 1. Indeed, there was not even a claim that the board members were required to swear additional oaths or affirmations as a qualification of their appointment. In short, *Parsell* had nothing to do with the constitutional provision at issue and is wholly irrelevant to the analysis.

The majority argues on VNP's behalf that the oath here is merely a qualification for office. In the context of the "test" prohibition contained in former versions of Article 11, § 1, our caselaw has long held that having "special qualifications" for an office (e.g., requiring that a candidate live in a municipality for a specified period of time or be a member of the state bar) does not violate this particular constitutional provision. See *Attorney General v Macdonald*, 164 Mich 590; 129 NW 1056 (1911). In the context of the "oath" prohibition, this Court has acknowledged that a statutory requirement that a candidate for office of county commissioner of schools file an affidavit or other proof showing his eligibility for such office did not conflict with the "no other oaths" language of the Constitution. *Tedrow v McNary*, 270 Mich 332, 335; 258 NW 868 (1935). The affidavit in *Tedrow* passed constitutional muster because it was "simply *prima facie* evidence that the

candidate [was] educationally qualified to discharge the duties of the office. No statement in any way affecting his rights as a citizen, or his religious or political affiliations, need appear therein." *Id*. The VNP proposal impermissibly inquires into the political affiliations of the oath-taker, and therefore, in my judgment, *Tedrow* does not support the conclusion that the VNP oath may be characterized as merely another qualification.

As the majority points out, judicial candidates must confirm by affidavit their qualifications for office. The affidavit of candidacy largely reflects a list of special qualifications: that the judge (1) is an incumbent judge and is domiciled within the relevant jurisdiction, (2) is a candidate for that office at the primary election, (3) is licensed to practice law in the state of Michigan, (4) has been admitted to the practice of law for at least five years, and (5) will not have attained the age of 70 years by election day. See Const 1963, art 6, § 19; MCL 168.544b. Again, these qualifications, like the education qualification in *Tedrow*, stop short of inquiring into a candidate's political affiliations and therefore are distinguishable from the VNP oath.

Perhaps *most* persuasive is the fact that VNP has not characterized its oath as a qualification. That is a characterization argued by the majority on behalf of VNP. The VNP proposal considers the oath separately and distinctly from the qualifications for a commissioner's position. The commissioner qualifications are listed in Article 4, § 6(1) of the VNP proposal: "[e]ach commissioner shall" be registered to vote in Michigan, not otherwise disqualified for appointed or elected office by the Michigan Constitution, and not currently, or in the past 6 years have been (or related to anyone who has been) (1) a declared candidate, elected official, or part of a governing body for federal, state, or local office; (2) a

paid consultant or employee of any elected official, political candidate, or political action committee; (3) a legislative employee; (4) a registered lobbyist; or (5) an unclassified state employee. The VNP oath requirement is placed in the next subsection, VNP proposal, art 4, § 6(2), which outlines the commissioner selection process.

The VNP oath may be more accurately characterized as a political test, but at any rate it is certainly an oath—which in my view directly conflicts with the plain letter of the Constitution. Const 1963, art 11, § 1 is crystal clear—"[n]o other oath [or] affirmation . . . shall be required as a qualification for any office or public trust." This appears to be absolute language. Because Const 1963, art 11, § 1 places an absolute ban on additional oaths or affirmations required as a qualification for office, it is analogous to an existing provision that "creates a mandatory requirement or uses language providing an exclusive power or authority because any change to such a provision would tend to negate the specifically conferred constitutional requirement." *Protect Our Jobs*, 492 Mich at 783. Equally as important, Article 11, § 1 is unlike an existing provision "that uses nonexclusive or nonabsolute language" deemed "less likely to be rendered inoperative" in *Protect Our Jobs*. *Protect Our Jobs*, 492 Mich at 783. Because the VNP proposal, which requires applicants to attest under oath regarding their political affiliation, appears to render the absolute language of Article 11, § 1 "wholly inoperative," *Protect Our Jobs*, 492 Mich at 773, it therefore constitutes an abrogation that is subject to the republication requirements of Const 1963, art 12, § 2 and MCL 168.482(3).[11]

[11] VNP contends that strict enforcement of the republication requirement of MCL 168.482(3) would be unconstitutional and that substantial

V. CONCLUSION

The VNP proposal requires that applicants to the independent citizens redistricting commission attest under oath that they either affiliate or do not affiliate with one of the two major political parties. Because the proposal would abrogate the Oath Clause of Const 1963, art 11, § 1, which forbids requiring additional oaths or affirmations as a qualification for public office, VNP was required to republish that provision on its petitions, as required by Const 1963, art 12, § 2 and MCL 168.482(3). It is uncontested that VNP failed to do so. Because strict compliance with the republication requirement was required, an order of mandamus should issue directing the rejection of the VNP proposal.

ZAHRA, J., concurred with WILDER, J.

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compliance with this requirement by publication of the Oath Clause of Const 1963, art 11, § 1 after certification of the proposal for the ballot would be sufficient. However, Const 1963, art 12, § 2 permits the Legislature to "prescribe" "the form" of petitions. "The Legislature accepted the Constitution's invitation to set forth publishing requirements for petitions," *Protect Our Jobs*, 492 Mich 778, and does not limit the ability to abrogate any provision of the Constitution, but merely requires republication of that provision if it is to be abrogated. There is nothing unconstitutional about this "form" requirement. Moreover, as this Court made clear in *Stand Up for Democracy*, 492 Mich at 602 (opinion by MARY BETH KELLY, J.), petitions for constitutional amendments must "strictly comply with the form and content requirements of the statute." We reaffirmed that "the principle articulated in *Stand Up* [of strict compliance with the republication requirement] applie[d] with equal force" in *Protect Our Jobs*. *Protect Our Jobs*, 492 Mich at 778. Therefore, VNP's assertion that substantial compliance is appropriate is not supported by our precedent.

PEOPLE v LEWIS

Docket No. 156092. Decided December 27, 2018.

Robert D. Lewis was convicted in the Macomb Circuit Court of one count of first-degree criminal sexual conduct, MCL 750.520b, and five counts of second-degree criminal sexual conduct, MCL 750.520c, for sexually assaulting his live-in girlfriend's daughters. The court, Richard L. Caretti, J., sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for the first-degree criminal sexual conduct conviction and to 200 to 360 months' imprisonment for the second-degree criminal sexual conduct convictions. The court also assessed $4,500 in costs and fees, representing $3,625 for attorney fees and $875 as a separate judgment. Defendant appealed, challenging his convictions and the amount of attorney fees assessed against him. The Court of Appeals affirmed defendant's convictions and sentences in an unpublished per curiam opinion, issued May 18, 2018 (Docket No. 331513), holding that the trial court properly awarded attorney fees without making findings of fact regarding the award of attorney fees because the language of MCL 769.1k(1)(b)(*iii*) and (*iv*) of the Code of Criminal Procedure, MCL 760.1 *et seq*., was clear such that a separate calculation of costs was not required. Defendant sought leave to appeal in the Supreme Court.

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

MCL 769.1k(1)(b)(*iii*) provides, in pertinent part, that if a court determines after a hearing or trial that the defendant is guilty, the court may impose any costs reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case. MCL 769.1k(1)(b)(*iv*) provides, in pertinent part, that if a court determines after a hearing or trial that the defendant is guilty, the court may impose the expenses of providing legal assistance to the defendant. The inclusion of the language "without separately calculating those costs involved in the particular case" under Subparagraph (*iii*) evidenced the Legislature's intent that the provision apply only to that subparagraph. Inclusion of

average-costs language in Subparagraph (*iii*)—rather than the Subdivision (b) umbrella—further suggested that the Legislature intended to create an exception to the default rule of Subdivision (b); if the exception permits costs without separate calculation, then logically the default rule must require that costs be separately calculated for the particular case. Moreover, MCL 769.1k(1)(b)(*iii*) does not include attorney fees in its list of the kinds of costs that do not have to be separately calculated for the particular defendant; although this list is nonexclusive, the costs of providing legal assistance to a defendant are logically distinguishable from the costs enumerated in Subparagraph (*iii*), in part because to include legal-assistance costs among Subparagraph (*iii*) costs would be to render Subparagraph (*iv*) surplusage. Moreover, the costs laid out under Subparagraph (*iii*) are all fairly standard expenses for a court's operations, tend not to vary significantly by case, and are not affected by any particular case; in contrast, attorney fees can vary greatly among defendants depending on a variety of circumstances, such as the nature and number of criminal charges.

Part V of the Court of Appeals' opinion reversed; case remanded to the trial court for that court to support its findings regarding the cost of providing legal assistance to defendant.

COSTS — CRIMINAL PROCEDURE — IMPOSITION OF EXPENSES FOR PROVIDING LEGAL ASSISTANCE TO A DEFENDANT — FINDINGS OF FACT ARE REQUIRED.

MCL 769.1k(1)(b)(*iv*) of the Code of Criminal Procedure, MCL 760.1 *et seq*., provides, in pertinent part, that if a court determines after a hearing or trial that the defendant is guilty, the court may impose the expenses of providing legal assistance to the defendant; if the sentencing court decides to impose expenses under MCL 769.1k(1)(b)(*iv*), the court must make findings of fact in support of the amount imposed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Joshua R. Van Laan*, Assistant Prosecuting Attorney, for the people.

Robert D. Lewis *in propria persona*.

PER CURIAM. At issue is whether a sentencing court may impose attorney fees upon a defendant under

MCL 769.1k(1)(b)(*iv*) of the Code of Criminal Procedure, MCL 760.1 *et seq*., without first making findings of fact in support of that amount. To answer that question, we must determine whether the language of MCL 769.1k(1)(b)(*iii*), which gives trial courts the authority to assess costs without "separately calculating those costs involved in the particular case," applies to the attorney-fee provision in Subparagraph (*iv*), which authorizes the imposition of expenses for legal assistance to a defendant. We conclude that it does not. Accordingly, we reverse Part V of the Court of Appeals' opinion and remand to the trial court for that court to support its findings related to the cost of providing legal assistance to defendant.

I. FACTS AND PROCEDURAL HISTORY

In December 2015, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b, and five counts of second-degree criminal sexual conduct, MCL 750.520c, for sexually assaulting his live-in girlfriend's daughters. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for the first-degree criminal sexual conduct conviction and to 200 to 360 months' imprisonment for the second-degree criminal sexual conduct convictions. The trial court also assessed $4,500 in costs and fees, representing $3,625 for attorney fees and $875 as a separate judgment.

Defendant appealed, challenging his convictions on several grounds, but pertinent to this appeal, he challenged the amount of attorney fees assessed against him. The Court of Appeals affirmed his convictions and sentences in an unpublished per curiam opinion, holding that the "trial court's award of $4,500 in defense

costs, without making findings of fact as to the award of attorney fees, was proper." *People v Lewis*, unpublished per curiam opinion of the Court of Appeals, issued May 18, 2017 (Docket No. 331513), p 6. The Court of Appeals reasoned that the language of MCL 769.1k(1)(b)(*iii*) and (*iv*) was clear such that a separate calculation of costs was not required—including the expense of providing defendant with legal assistance. *Id*.

II. STANDARD OF REVIEW

Questions of statutory interpretation are reviewed de novo. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

III. LEGAL BACKGROUND AND APPLICATION

"When construing a statute, our primary goal is 'to ascertain and give effect to the intent of the Legislature.' " *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003), quoting *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). "When a court interprets a statute, it first looks to its 'plain language, which provides the most reliable evidence of intent.' " *People v McFall*, 309 Mich App 377, 384; 873 NW2d 112 (2015), quoting *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014). If the statute's language is clear and unambiguous, then judicial construction is inappropriate and the statute must be enforced as written. *McKinley*, 496 Mich at 415. A necessary corollary of this principle is that a " 'court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' " *Phillips*, 469 Mich at 395, quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Furthermore, when the

Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional. *McFall*, 309 Mich App at 385-386.

MCL 769.1k(1)(b)(*iii*) and (*iv*) provide, in pertinent part:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred by statute or sentencing is delayed by statute:
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> * * *
>
> (b) The court may impose any or all of the following:
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> * * *
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> (*iii*) . . . any costs reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case . . .
>
> * * *
>
> (*iv*) The expenses of providing legal assistance to the defendant.

The instant issue previously appeared before the Court of Appeals in *People v Duke*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2016 (Docket No. 325473). That panel held that the trial court was required to establish the cost of legal representation for the specific defendant when assessing attorney fees pursuant to MCL 769.1k(1)(b)(*iv*). *Id*. at 2. The panel explained:

> [W]hile language in MCL 769.1k(1)(b)(*iii*) authorizes the trial court to assess costs without separately calculating the costs for the particular case, the attorney fee provision

> in MCL 769.1k(1)(b)(*iv*) does not include that same language. Compare MCL 769.1k(1)(b)(*iii*) ("any cost reasonably related to the actual costs incurred by the trial court *without separately calculating those costs involved in the particular case* . . . ." (emphasis added)), with MCL 769.1k[(1)(b)](*iv*) ("[t]he expenses of providing legal assistance *to the defendant*." (emphasis added)). When the legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional. *People v McFall*, 309 Mich App 377; 873 NW2d 112 (2015), quoting *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). Thus, the trial court must establish the cost of providing legal services to the specific defendant at issue when assessing attorney fees under MCL 769.1k(1)(b)(*iv*). [*Duke*, unpub op at 2.]

We agree that the inclusion of the language "without separately calculating those costs involved in the particular case" under Subparagraph (*iii*) evidences the Legislature's intent that the provision apply only to that subparagraph. Inclusion of average-costs language in Subparagraph (*iii*)—rather than the Subdivision (b) umbrella—further suggests that the Legislature intended to create an exception to the default rule of Subdivision (b); if the exception permits costs *without* separate calculation, then logically the default rule must require that costs be separately calculated for the particular case. Moreover, MCL 769.1k(1)(b)(*iii*) does not include attorney fees in its list of the kinds of costs that do not have to be separately calculated for the particular defendant, namely: "[s]alaries and benefits for relevant court personnel," "[g]oods and services necessary for the operation of the court," and "[n]ecessary expenses for the operation and maintenance of court buildings and facilities." Although this list is nonexclusive, the costs of providing legal assistance to a defendant are logically distinguishable from the costs enumerated in Subparagraph (*iii*), in part because to

include legal-assistance costs among Subparagraph (*iii*) costs would be to render Subparagraph (*iv*) surplusage. See *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009) ("In interpreting a statute, we avoid a construction that would render part of the statute surplusage or nugatory."). Moreover, the costs laid out under Subparagraph (*iii*) are all fairly standard expenses for a court's operations, tend not to vary significantly by case, and are not affected by any particular case. In contrast, attorney fees can vary greatly among defendants depending on a variety of circumstances, such as the nature and number of the criminal charges.

IV. CONCLUSION

For the foregoing reasons, we conclude that the trial court was required to determine the cost of providing legal assistance to defendant pursuant to MCL 769.1k(1)(b)(*iv*). The Court of Appeals erred by holding otherwise. For this reason, we reverse Part V of the Court of Appeals' opinion and remand to the trial court for that court to support its findings regarding the cost of legal assistance provided to defendant.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred.

BAUSERMAN v UNEMPLOYMENT INSURANCE AGENCY

Docket No. 156389. Argued on application for leave to appeal October 10, 2018. Decided April 5, 2019.

Grant Bauserman, Karl Williams, and Teddy Broe, on behalf of themselves and all others similarly situated, brought an action in the Court of Claims against the Unemployment Insurance Agency, alleging that defendant had violated their due-process rights by depriving them of property without providing adequate notice and an opportunity to be heard and that defendant had also engaged in unlawful collection practices. Defendant had employed an automated fraud-detection system to determine that plaintiffs had received unemployment benefits for which they were not eligible, and defendant then garnished plaintiffs' wages, benefits, and tax refunds to recover the amount of alleged overpayments, interest, and penalties that defendant had assessed. Plaintiffs each challenged the determinations, and while defendant's investigation of Williams's situation remained pending, defendant issued redeterminations with respect to Bauserman and Broe that cleared them of fraud. Defendant moved for summary disposition on a number of grounds, including that plaintiffs had failed to comply with the notice provision of MCL 600.6431(3) because they did not file their complaint within six months following the "happening of the event giving rise to the cause of action." The Court of Claims, CYNTHIA D. STEPHENS, J., denied defendant's motion, concluding that plaintiffs' claims accrued when they received defendant's redetermination notices that nullified its previous fraud findings and that plaintiffs' claims had been filed within six months of that event. The Court of Appeals, GADOLA, P.J., and METER and FORT HOOD, JJ., reversed, concluding that plaintiffs' claims accrued when they received the original notices alleging fraudulent conduct and explaining the effect that would have on their unemployment compensation. *Bauserman v Unemployment Ins Agency*, unpublished per curiam opinion of the Court of Appeals, issued July 18, 2017 (Docket No. 333181). Plaintiffs applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1047 (2018).

In a unanimous opinion by Justice MARKMAN, the Supreme Court, in lieu of granting leave to appeal, *held*:

Under MCL 600.6431(3), the "happening of the event giving rise to the cause of action" for a claim seeking monetary relief is when the claim accrues, and a procedural-due-process claim seeking monetary relief accrues when the deprivation of life, liberty, or property has occurred. In the instant case, plaintiffs were deprived of their property when their tax refunds were seized or their wages garnished. As a result, plaintiffs Bauserman and Broe timely filed their claims within six months following the deprivation of their property, while plaintiff Williams did not. Accordingly, the judgment was affirmed in part and reversed in part, and the case was remanded to the Court of Appeals for further proceedings.

1. MCL 600.6431, which establishes when and how a claim against a government agency may be initiated, provides in part that a claimant must file a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action. For purposes of this provision, dictionary definitions indicate that an event has given rise to a cause of action when it triggers a person's ability to obtain a remedy in court. MCL 600.5827 provides in part that a period of limitations generally runs from the time a claim accrues, which is at the time the wrong upon which a claim is based was done regardless of the time when damage results. With regard to claims seeking monetary relief, there is no meaningful distinction between the happening of the event giving rise to the cause of action in MCL 600.6431(3) and when such a claim accrues under MCL 600.5827.

2. Article 1, § 17 of the Michigan Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. The Due Process Clause is violated only if there has been a deprivation of life, liberty, or property. If there is no such deprivation, no process is due and thus no harm has occurred. In other words, a plaintiff incurs no harm under the Due Process Clause until and unless the plaintiff incurs a deprivation of property. Thus, the actionable harm in a pre-deprivation due-process claim occurs when a plaintiff has been deprived of property, and therefore, such a claim accrues when a plaintiff has first incurred the deprivation of property.

3. The instant case was unlike the situation in *Frank v Linkner*, 500 Mich 133 (2017), which involved an action for member oppression within a limited liability company under MCL 450.4515. In *Frank*, the Supreme Court concluded that the

plaintiffs' claim accrued before they incurred any calculable financial injury, reasoning that because the actionable harm for a member-oppression claim under MCL 450.4515 consists of actions taken by the managers that substantially interfere with the interests of the member as a member, and because monetary damages constitute just one of many potential remedies for that harm, an action for member oppression does not necessarily accrue when a plaintiff incurs a calculable financial injury; instead, it accrues when a plaintiff incurs the actionable harm under MCL 450.4515, i.e., when defendants' actions allegedly interfered with the interests of a plaintiff as a member, making the plaintiff eligible to receive some form of relief under MCL 450.4515(1). Unlike a claim for member oppression under MCL 450.4515, in which the harm itself can occur before incurring a calculable financial injury, no harm for a violation of due process can occur without or before a deprivation of property. Accordingly, the Court of Appeals erred by holding that plaintiffs' due-process claims seeking monetary relief accrued when plaintiffs were deprived of process; rather, these claims accrued only when plaintiffs were deprived of property. Because the accrual under MCL 600.5827 of a due-process claim seeking monetary relief gave rise to a cause of action for purposes of MCL 600.6431(3), the six-month period from MCL 600.6431(3) was triggered when plaintiffs were deprived of property.

4. Plaintiffs were not deprived of property either when the initial redetermination notices were sent informing plaintiffs of liability or when plaintiffs received defendant's notices of an intention to intercept their tax refunds or wages. These notices merely apprised plaintiffs of the amount owed to defendant and the actions that would be undertaken if payment was not made; they did not actually seize plaintiffs' property. With regard to plaintiff Bauserman, he first incurred a deprivation of property on June 6, 2015, when defendant intercepted his federal and state income tax refunds. Accordingly, his September 9, 2015 complaint was timely filed within six months following the happening of the event giving rise to the cause of action under MCL 600.6431(3). Similarly, plaintiff Broe first incurred a deprivation of property when his tax refunds were seized in May 2015, and therefore his claim against defendant was also timely filed under MCL 600.6431(3). However, plaintiff Williams first incurred a deprivation of property when his wages were garnished on May 16, 2014, and his claim was not filed within six months of that deprivation. Therefore, plaintiffs Bauserman and Broe timely filed their claims, while plaintiff Williams did not.

Affirmed in part, reversed in part, and remanded to the Court of Appeals for further proceedings.

Chief Justice MCCORMACK, concurring, agreed that if the six-month notice period in MCL 600.6431(3) governed plaintiffs' claims, it started to run when the state deprived plaintiffs of a property interest without due process. She wrote separately, however, because she was not convinced that the rule from *McCahan v Brennan*, 492 Mich 730 (2012), and *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), which requires strict compliance with the notice requirements for statutorily created claims, applied to due-process claims in particular or to constitutional tort claims in general. However, because Williams conceded that the six-month notice period in MCL 600.6431(3) for property damage or personal injury applied to his claims, Chief Justice MCCORMACK agreed with the majority that Williams's claim was untimely because he failed to file notice within six months of the May 2014 garnishment, when he first suffered a deprivation of property.

Justice CAVANAGH did not participate in the disposition of this case because the Court considered it before she assumed office.

ACTIONS — CLAIMS AGAINST THE STATE — MONETARY RELIEF — PROCEDURAL DUE PROCESS — ACCRUAL.

Under MCL 600.6431(3), the "happening of the event giving rise to the cause of action" for a claim against the state seeking monetary relief is when the claim accrues, and a procedural-due-process claim seeking monetary relief accrues when the deprivation of life, liberty, or property has occurred.

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Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Jason Hawkins* and *Debbie K. Taylor*, Assistant Attorneys General, for defendant.

Amicus Curiae:

University of Michigan Unemployment Insurance Clinic (by *Rachael Kohl* and *Steve Gray*) and *Foley & Lardner LLP* (by *Norman C. Ankers*) for the Michigan

League for Public Policy and Michigan Public Employees Service Employees International Union Local 517M.

MARKMAN, J. This case involves a narrow, but practically consequential, issue: whether plaintiffs gave timely notice of their due-process claims to defendant, the Michigan Unemployment Insurance Agency (the Agency), and therefore are entitled to consideration of the merits of those claims. More specifically, the issue concerns whether plaintiffs filed notices of intention to file their claims or the claims themselves "within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3). We hold that the "happening of the event giving rise to the cause of action" for a claim seeking monetary relief is when the claim accrues, and a procedural-due-process claim seeking monetary relief accrues when the deprivation of life, liberty, or property has occurred. In the instant case, plaintiffs were deprived of their property when their tax refunds were seized or their wages garnished. As a result, plaintiffs Bauserman and Broe timely filed their claims within six months following the deprivation of their property, while plaintiff Williams did not. Accordingly, we affirm in part and reverse in part the judgment of the Court of Appeals and remand to that Court for further proceedings consistent with this opinion.

I. FACTS AND HISTORY

Plaintiffs are former recipients of unemployment compensation benefits who allege that the Agency unlawfully seized their property without affording due process of law. Plaintiff Bauserman received unemployment compensation from October 2013 through March 2014. In October 2014, the Agency sent Bauserman and his former employer, Eaton Aeroquip (Eaton),

a questionnaire regarding suspected unreported earnings that Bauserman received while he was receiving unemployment compensation. Both Bauserman and Eaton responded that Bauserman had not worked for Eaton at the time. On December 3, 2014, the Agency sent Bauserman two notices of redetermination, one claiming that he had received unemployment compensation for which he was ineligible and the other claiming that he had intentionally misled the Agency or concealed information from it to obtain compensation for which he was not eligible. As a result, the Agency informed Bauserman that he owed $19,910 in overpayments, penalties, and interest. The next day, Bauserman submitted an online appeal through the Agency's website regarding its assertion that he had committed fraud, but did not submit a separate appeal regarding the Agency's determination that he had received compensation for which he was not eligible.

From January 2015 through June 2015, the Agency sent Bauserman multiple notices stating the amount he owed to the Agency, informing him of missed payments on his debt, and raising the possibility that his wages would be garnished or his tax refunds seized. One of these communications consisted of a "notice of intent to reduce/withhold federal income tax refund," which warned Bauserman that "if you do not pay the amount shown or take other action described below within 60 days of the mail date on this form, the [Agency] will submit this benefit overpayment balance (restitution) to . . . the United States Department of Treasury . . . [which] will reduce or withhold any federal income tax refund you may be due and will instead forward that amount to the [Agency]." Around this same time, Bauserman sent multiple letters to the Agency attempting to explain the situation, two of which included an attached letter from Eaton explain-

ing that Bauserman received one payment in 2014 for work performed in 2013 but was not employed by Eaton during the time he was receiving unemployment compensation. Finally, on June 16, 2015, the Agency intercepted Bauserman's state and federal income tax refunds.

On September 9, 2015, Bauserman filed a putative class action against the Agency in the Court of Claims, alleging that the Agency had deprived him of his property without providing due process of law. More specifically, he alleged that "Michigan's unemployment fraud detection, collection, and seizure practices fail to comply with minimum due process requirements." On September 30, 2015, the Agency issued two new notices of redetermination, rendering its December 3, 2014 redeterminations "null and void," and the Agency has since returned all monies seized from Bauserman.

On October 19, 2015, Bauserman filed an amended complaint, which added Teddy Broe and Karl Williams as named plaintiffs to the class action. Broe had received unemployment compensation from April 2013 to August 2013, and he had initially been determined eligible on the basis that he had been laid off by his employer, Fifth Third Bank (Fifth Third). However, Fifth Third challenged that determination, alleging that Broe voluntarily terminated his employment to attend school. The Agency then sent requests for information to Broe regarding his eligibility for compensation, and on July 15, 2014, it sent two notices of redetermination to Broe, the first claiming that he had received compensation for which he was ineligible because his termination of employment at Fifth Third "was voluntary and not attributable to the employer," and the second claiming that he had intentionally misled the Agency or concealed information from it to

obtain compensation that he was not eligible to receive. As a result, the Agency informed Broe that he owed $8,302 in overpayments, penalties, and interest.

From August 2014 through April 2015, the Agency sent Broe multiple notices stating the amount owed to the Agency, informing him of missed payments on the debt and raising the possibility that his wages would be garnished or his tax refunds seized. Specifically, on September 2, 2014, the Agency sent Broe a "notice of intent to reduce/withhold federal income tax refund" that was materially identical to the notice provided to Bauserman. In April 2015, Broe sent the Agency a letter appealing its redeterminations and claiming that he had not received the Agency's previous communications because they had been sent to him through his online account with the Agency, which he no longer accessed because he was reemployed and no longer seeking unemployment compensation. The Agency denied the appeal as untimely and, in May 2015, intercepted Broe's state and federal tax refunds. On November 4, 2015, the Agency issued two notices of redetermination, reversing its July 15, 2014 redeterminations that Broe was ineligible for compensation and had committed fraud. The Agency has since returned all monies seized from Broe.

Williams started working at Wingfoot Commercial Tire System in May 2011. When his employment with Wingfoot began, Williams was receiving unemployment compensation from a previous employer. Williams alleges that he advised the Agency that he was now receiving wages from Wingfoot, yet his unemployment compensation had not been altered; Williams believed that he was still entitled to unemployment compensation because his wages from Wingfoot were less than 1½ times his weekly compensation. See MCL

421.48(1). The Agency sent Williams a request to provide information regarding his employment with Wingfoot. On June 22, 2012, the Agency issued redeterminations that (1) terminated Williams's receipt of future unemployment compensation, (2) asserted that he had already received compensation for which he was ineligible due to his employment with Wingfoot, and (3) alleged that he had intentionally misled the Agency or concealed information from it to obtain compensation for which he was not eligible.

On October 29, 2013, the Agency sent Williams a "notice of garnishment" stating that, if the amount owed was not provided to the Agency within 30 days, his "employer [would] be required to deduct and send to [the Agency] up to 25% of [his] disposable earnings each pay period until the debt is paid in full." Williams's wages were first garnished, at the latest, on May 16, 2014,[1] and on May 27, 2014, the Agency sent Williams a "notice of intent to reduce/withhold federal income tax refund" that was materially identical to the notices provided to Bauserman and Broe. Williams sent a letter appealing the Agency's redeterminations on May 22, 2014. The Agency denied Williams's appeal as untimely, as did an administrative law judge. Finally, on February 19, 2015, the Agency seized Williams's federal income tax refund and continues to collect his debt by this means.

Plaintiffs' amended complaint alleges that the Agency violated the class members' due-process rights by (1) depriving them of property without providing adequate notice and an opportunity to be heard and (2)

[1] It is not clear from the record whether Williams's wages had been garnished at any time before May 16, 2014. However, even if his wages were garnished before this time, this would not affect the determination that Williams's claim was not timely filed.

engaging in unlawful collection practices by, among other things: (a) imposing a higher level of interest than permitted, (b) collecting interest on penalties, and (c) employing wage garnishments. The Agency moved for summary disposition on a number of grounds, including that plaintiffs failed to comply with the notice provision of MCL 600.6431(3) because they had not filed the complaint within six months following the "happening of the event giving rise to the cause of action." The Court of Claims denied the Agency's motion, concluding that plaintiffs' claims accrued when they received the Agency's redetermination notices that rendered its previous fraud findings null and void and that plaintiffs' claims had been filed within six months of that event.[2] The Court of Appeals reversed, concluding that plaintiffs' claims accrued when they received the *original* redetermination notices alleging fraudulent conduct and explaining the effect that would have on their unemployment compensation. *Bauserman v Unemployment Ins Agency*, unpublished per curiam opinion of the Court of Appeals, issued July 18, 2017 (Docket No. 333181), p 9.[3] The Court of Appeals reasoned that the hallmark of a due-process claim is inadequate process and therefore that was the "actionable harm" for the purposes of accrual; the subsequent seizing of plain-

[2] The Court of Claims also held that the return of the funds seized from Bauserman and Broe did not render their claims moot and that plaintiffs were exempt from the requirement that they exhaust their administrative remedies because they raised a facial constitutional challenge to defendant's policies and procedures. Because the Agency has not challenged these holdings in either the Court of Appeals or this Court, we decline to address them.

[3] In the Court of Appeals, the Agency also argued that even if plaintiffs' claims were timely filed, they did not raise viable constitutional tort claims and therefore the claims were barred by governmental immunity on that basis. Because the Court of Appeals found the timeliness issue dispositive, it declined to address this alternative argument.

tiffs' property merely reflected the damage resulting from that deprivation and did not establish the date of accrual. *Id*. at 10. Plaintiffs thereafter filed an application for leave to appeal in this Court, and we scheduled oral argument on the application, instructing the parties to address

> whether "the happening of the event giving rise to [appellants'] cause of action" for the deprivation of property without due process occurred when the appellee issued its allegedly wrongful notice of redetermination, or when the appellee actually seized the appellants' property. MCL 600.6431(3); MCL 600.5827; cf. *Frank v Linkner*, 500 Mich 133, 149-153 (2017). [*Bauserman v Unemployment Ins Agency*, 501 Mich 1047 (2018).]

II. STANDARD OF REVIEW

MCL 600.6431 "establishes conditions precedent for avoiding" governmental immunity. *Fairley v Dep't of Corrections*, 497 Mich 290, 297; 871 NW2d 129 (2015). In other words, if a plaintiff fails to comply with MCL 600.6431, his or her claims against a governmental agency are barred by governmental immunity. *Id*. This Court reviews de novo a lower court's decision to grant summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity. *Yono v Dep't of Transp*, 499 Mich 636, 645; 885 NW2d 445 (2016). "When a motion is filed under this subrule, the court must consider not only the pleadings, but also any affidavits, depositions, admissions or documentary evidence that is filed or submitted by the parties." *Kerbersky v Northern Mich Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998), citing MCR 2.116(G)(5). "Further, whether MCL 600.6431 requires dismissal of a plaintiff's claim for failure to provide the designated notice raises questions of statutory interpretation, which we . . . review de novo." *McCahan v Brennan*, 492 Mich 730, 735-736; 822 NW2d 747 (2012) (citation omitted).

III. ANALYSIS

A. MCL 600.6431

MCL 600.6431 establishes when and how a claim against a government agency may be initiated:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
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> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself *within 6 months following the happening of the event giving rise to the cause of action*. [Emphasis added.]

In *McCahan*, 492 Mich at 739, we explained:

> Subsection (1) sets forth the general notice required for a party to bring a lawsuit against the state, while subsection (3) sets forth a special timing requirement applicable to a particular subset of those cases—those involving property damage or personal injury. Subsection (3) merely reduces the otherwise applicable one-year deadline to six months. In this regard, subsection (3) is best understood as a subset of the general rules articulated in subsection (1), and those general rules and requirements articulated in subsection (1)—including the bar-to-claims language—continue to apply to *all* claims brought against the state unless modified by the later-stated specific rules.

The parties agree that plaintiffs' causes of action here are for "property damage or personal injuries,"[4] and therefore plaintiffs' claims are barred unless they filed their complaint or notice of intent to sue "within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3); see also *McCahan*, 492 Mich at 745.[5]

The question presented concerns how to determine the "event giving rise to the cause of action" for the purpose of triggering the six-month notice period in MCL 600.6431(3). A "cause of action" is defined as "[a]

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[4] Because the issue is uncontested, we presume, without deciding, that a claim alleging a violation of due process constitutes an "action[] for property damage" that is properly analyzed under MCL 600.6431(3). Compare *Sanderson v Unemployment Ins Agency*, unpublished per curiam opinion of the Court of Appeals, issued August 23, 2018 (Docket No. 338983), p 3 (holding that a due-process claim based on the deprivation of property constitutes an "action[] for property damage" because "it involves a harm to a person's lawful, unrestricted use of property"), with *id.* at 3 (SHAPIRO, J., concurring) (arguing that such a claim does not constitute an "action[] for property damage" because "plaintiffs do not seek to recover for *damage* to property, they simply seek the return of the property").

[5] While *McCahan* involved a nonconstitutional claim against the state, the Court of Appeals has held that *McCahan* applies equally to constitutional claims. *Rusha v Dep't of Corrections*, 307 Mich App 300, 307-314; 859 NW2d 735 (2014). However, *Rusha* recognized an exception to "strict enforcement" of a notice period where one raises a constitutional claim and enforcement of that notice period would "effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *Id.* at 311 (quotation marks and citation omitted). Recently, the Court of Appeals applied this "exception" on the basis of the allegedly "harsh and unreasonable consequences" that would result from enforcement of the notice period in that particular case. *Mays v Governor*, 323 Mich App 1, 30-35; 916 NW2d 227 (2018), application for lv to appeal pending. Plaintiffs do not argue that *McCahan* is inapplicable to their claims, nor do they argue that it would be "harsh and unreasonable" to apply the notice period to them in this case. Accordingly, for the purposes of this case, failure to comply with MCL 600.6431(3) would bar plaintiffs' claims against the Agency, and we do not express any opinion regarding whether *Rusha* and *Mays* were decided correctly.

group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; CLAIM." *Black's Law Dictionary* (10th ed).[6] "Rise" is defined, in relevant part, as "origin, source or beginning," and "give rise to" is defined as "to originate; produce; cause[.]" *Random House Dictionary of the English Language* (1969); see also *People v McKinley*, 496 Mich 410, 419; 852 NW2d 770 (2014) (defining "gives rise to" as "to produce or cause"); *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "rise" as "BEGINNING, ORIGIN"). Put together, an event has "giv[en] rise to the cause of action" when that event "origin[ates]" a "basis for suing" and "entitle[s] one person to obtain a remedy in court." In other words, an "event giv[es] rise to a cause of action" when it triggers a person's ability to obtain a remedy in court.[7]

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[6] "Claim" is relevantly defined as "[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional" and "a demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for." *Black's Law Dictionary* (10th ed).

[7] The Agency argues that the phrase "giving rise to the cause of action" suggests that the cause of action has not yet fully arisen. We respectfully disagree. Rather, a plaintiff's "cause of action," i.e., a factual situation that entitles one to obtain a remedy in court, does not "begin or originate" until that cause of action actually arises. The Agency appears to argue that the "event giving rise to the cause of action" may occur before the cause of action has fully arisen because an action can set into motion a series of events that eventually provide a plaintiff a cause of action. On this reasoning, any event that eventually leads to a cause of action might "giv[e] rise to the cause of action." To take this case as an example, plaintiffs' initial receipt of unemployment compensation may be argued to have set into motion the series of events that eventually led to their due-process claims. However, such receipt of compensation could hardly be said to have "originated" plaintiffs' causes of action because they could not have obtained a remedy at that juncture. Accordingly, we disagree with the Agency that the event "giving rise to the cause of action" may occur before a plaintiff can obtain a legal remedy in court.

With regard to claims seeking monetary relief, we can identify no meaningful distinction between "the happening of the event giving rise to the cause of action" in MCL 600.6431(3) and when a claim accrues. MCL 600.5827 provides that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."[8] We have explained that the date of the "wrong" referred to in MCL 600.5827 is " 'the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty.' " *Frank v Linkner*, 500 Mich 133, 147; 894 NW2d 574 (2017) (citation omitted). "The relevant 'harms' for that purpose are the actionable harms alleged in a plaintiff's cause of action." *Id*. at 150.

We believe that the "actionable harm" we discussed in *Frank* is the "event giving rise to [a] cause of action" seeking monetary relief under MCL 600.6431(3). The harm that enables a plaintiff to bring an action for monetary relief (i.e., the "actionable harm") necessarily "originates" such a cause of action and is, thus, "the event giving rise to the cause of action."[9] As a

[8] Because the issue is uncontested, we presume, without deciding, that the definition of "accrual" in MCL 600.5827 applies equivalently to MCL 600.6431. But even if we were to apply the common-law definition of "accrual" in this context, this would not alter our conclusion that the "happening of the event giving rise to [plaintiffs'] cause[s] of action" for monetary relief occurred when they were deprived of property. Under the common law, a claim generally accrues "when all of the elements of the cause of action have occurred and can be alleged in a proper complaint." *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 150; 200 NW2d 70 (1972). Accord *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994); *Parish v B F Goodrich Co*, 395 Mich 271, 284; 235 NW2d 570 (1975). Here, plaintiffs could assert their due-process claims only when the alleged deprivations had occurred. Thus, it is immaterial for purposes of the instant case whether we apply the definition of "accrual" in § 5827 or from the common law.

[9] There might be some circumstances in which an event would "give

result, we find that there is no meaningful distinction between "the happening of the event giving rise to [a] cause of action" seeking monetary relief under MCL 600.6431(3) and when such a claim accrues under MCL 600.5827.[10]

B. ACCRUAL OF DUE-PROCESS CLAIM

As in *Frank*, in this case we are called upon to "determine the date on which plaintiffs first incurred

rise to the cause of action" *before* a plaintiff incurs harm. In particular, a plaintiff can sometimes obtain prospective relief, such as declaratory relief under MCR 2.605 or injunctive relief under MCR 3.310, even if no actual harm has yet occurred. *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978) ("[A] court is not precluded from reaching issues [in a declaratory judgment action] before actual injuries or losses have occurred."); *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 127; 537 NW2d 596 (1995) ("Because a suit for injunctive relief may seek to prevent a future wrong, the cause of action necessarily arises before the wrong occurs."). However, plaintiffs have waived their claims for injunctive and equitable relief, see Appellants' Supplemental Brief at 6 ("The appellants' cause of action is an action for damages based on the deprivation of property without due process."), and none of the parties argues that some event could "give rise" to a claim for prospective relief prior to an event that "gives rise" to monetary relief. Therefore, we need not decide in this case what effect, if any, the availability of a prospective remedy has upon the determination of the "happening of the event giving rise to the cause of action" under MCL 600.6431(3).

[10] In so holding, we recognize that the Legislature used the term "accrue" in Subsection (1), MCL 600.6431(1) ("No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued . . . ."), but not in Subsection (3), which instead contains the phrase "the happening of the event giving rise to the cause of action," MCL 600.6431(3). Ordinarily, we assign significance to the Legislature's choice of different words. See, e.g., *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 369; 917 NW2d 603 (2018). Thus, this difference in language suggests that the phrase "happening of the event giving rise to the cause of action" may have a different meaning than "accrue" under Subsection (1). However, the maxim that a difference in language signifies a difference in meaning is a *general* rule; it may not apply in every situation. See 2A Singer & Singer, Sutherland Statutory Con-

the harms they assert" by looking to the "actionable harms" alleged in plaintiffs' complaint. *Frank*, 500 Mich at 150. Plaintiffs allege that the Agency violated their due-process rights under the Michigan Constitution when it (1) seized their property without reasonable notice and an opportunity to be heard and (2) engaged in unlawful collection practices. Thus, the question is at what point plaintiffs first incurred or suffered the "actionable harm" for a claim alleging a violation of predeprivation due process.[11]

The Michigan Constitution provides:

> No person shall . . . be deprived of life, liberty or property, without due process of law. [Const 1963, art 1, § 17.][12]

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struction (7th ed), § 46:6, p 261 ("Different words used in the same, or a similar, statute are assigned different meanings *whenever possible*.") (emphasis added); Black, *Handbook on the Construction and Interpretation of the Laws* (St. Paul: West Publishing Co, 1911), p 145 ("Conversely, where different language is used in the same connection, in different parts of the statute, *it is presumed* that the legislature intended it to have a different meaning and effect.") (emphasis added). Because the parties agree that plaintiffs' claims are governed by MCL 600.6431(3) rather than MCL 600.6431(1), we need not resolve in this case how to define the term "accrual" in the context of MCL 600.6431(1) or how that definition relates to "the happening of the event giving rise to the cause of action" under MCL 600.6431(3).

[11] The United States Supreme Court has recognized that "[i]n some circumstances . . . a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." *Zinermon v Burch*, 494 US 113, 128; 110 S Ct 975; 108 L Ed 2d 100 (1990). However, plaintiffs aver in their complaint that "[p]ost-deprivation remedies are insufficient to protect claimants' rights to due process because even a temporary deprivation of wages, unemployment benefits, [or] tax refunds creates a substantial burden on claimants who rely upon such income to live and support themselves and their families." Accordingly, plaintiffs allege that postdeprivation process is necessarily insufficient in this case and thus allege further a violation of due process in the procedures employed by the Agency *before* any deprivation occurred.

[12] Similarly, the United States Constitution provides, "nor shall any

The Due Process Clause precludes the state from (1) depriving one of life, liberty, or property (2) without due process of law. Clearly, the clause is violated only if there has been a deprivation of life, liberty, or property. *Bonner v City of Brighton*, 495 Mich 209, 225-226; 848 NW2d 380 (2014). If there is no such deprivation, no process is "due" and thus no harm has occurred. *Williams v Hofley Mfg Co*, 430 Mich 603, 610; 424 NW2d 278 (1988) ("It is well established . . . that the requirements of procedural due process are triggered only by the implication of protected property or liberty interests. . . . It is only when a protected interest has been found that we may proceed to determine what process is due."); see also *Fuentes v Shevin*, 407 US 67, 84; 92 S Ct 1983; 32 L Ed 2d 556 (1972) ("The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection."). In other words, a plaintiff incurs no harm under the Due Process Clause until and unless he or she incurs a deprivation of property. Thus, the "actionable harm" in a predeprivation due-process claim occurs when a plaintiff has been deprived of property, and therefore such a claim "accrues" when a plaintiff has first incurred the deprivation of property.

The Agency argues that, under *Carey v Piphus*, 435 US 247, 266; 98 S Ct 1042; 55 L Ed 2d 252 (1978), the

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state deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV. Plaintiffs solely allege that the Agency violated Michigan's Due Process Clause. Accordingly, this Court is not bound by federal precedent interpreting the Due Process Clause of the United States Constitution. See *People v Bullock*, 440 Mich 15, 27; 485 NW2d 866 (1992) ("This Court alone is the ultimate authority with regard to meaning and application of Michigan law.") However, because of the textual similarities between the state and federal Due Process Clauses, we may nonetheless find persuasive United States Supreme Court cases interpreting the federal Due Process Clause in this context. See *People v Sierb*, 456 Mich 519, 523-524 & n 10; 581 NW2d 219 (1998).

lack of process itself constitutes the "actionable harm" and that the deprivation of property is merely a financial consequence or manifestation of that harm. The Agency further notes that the United States Supreme Court held in *Carey* that one can recover nominal damages for the deprivation of due process even if he or she "did not suffer any other actual injury," *id*., and reasons from this that it is the deprivation of process that constitutes the "actionable harm" for a due-process claim, not the deprivation of property.

However, we believe that the Agency misconstrues *Carey*. The issue in *Carey* was whether students who were suspended from school without due process could recover damages under 42 USC 1983.[13] *Id*. at 248. The United States Supreme Court previously had held that students possess property and liberty interests in continued education, see *Goss v Lopez*, 419 US 565, 576; 95 S Ct 729; 42 L Ed 2d 725 (1975), and that there was no dispute that the *Carey* plaintiffs had been deprived of that "property" without due process. The question then was whether, if the plaintiffs' suspensions were justified despite the lack of due process, they could recover damages. *Carey*, 435 US at 266. In other words, could the *Carey* plaintiffs recover damages if they still would have been suspended had they received due process? The Court held:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without

[13] 42 USC 1983 provides a cause of action "to redress deprivations of civil rights by persons acting 'under color of any [state] statute, ordinance, regulation, custom, or usage.' " *Hafer v Melo*, 502 US 21, 27; 112 S Ct 358; 116 L Ed 2d 301 (1991), quoting 42 USC 1983 (alteration in original).

> proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners. [*Id*. at 266-267 (citation omitted).]

Thus, the Court concluded that even if the plaintiffs would have been suspended had they received due process, they could recover nominal damages based on the denial of due process. However, this does not mean that a person can incur "harm" under the Due Process Clause absent a deprivation of property. While a plaintiff can recover damages under the Due Process Clause based solely on the deprivation of due process, no "harm" entitling one to such damages occurs without —or before—a deprivation of property. See *Bd of Regents of State Colleges v Roth*, 408 US 564, 576; 92 S Ct 2701; 33 L Ed 2d 548 (1972) ("The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.").

The Agency also argues that this Court's recent decision in *Frank v Linkner* supports its argument that plaintiffs' claims accrued upon the denial of process, rather than upon the deprivation of property. In *Frank*, former employees of defendant ePrize brought an action for member oppression within a limited liability company (LLC) under MCL 450.4515, which provides a cause of action for members of an LLC in which the "acts of the managers or members in control of the [LLC] are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the [LLC] or the member." " '[W]illfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member." MCL

450.4515(2). This Court concluded that the plaintiffs' claim accrued before they incurred any calculable financial injury, reasoning:

> [T]he actionable harm for a member-oppression claim under MCL 450.4515 consists of actions taken by the managers that "substantially interfere with the interests of the member as a member," and monetary damages constitute just one of many potential remedies for that harm . . . . Accordingly, . . . an action for LLC member oppression does not necessarily accrue when a plaintiff incurs a calculable financial injury. Instead, it accrues when a plaintiff incurs the actionable harm under MCL 450.4515, i.e., when defendants' actions allegedly interfered with the interests of a plaintiff as a member, making the plaintiff eligible to receive some form of relief under MCL 450.4515(1). [*Frank*, 500 Mich at 152-153.]

In other words, a calculable financial injury was one potential consequence of the "actionable harm" in an LLC member-oppression claim, but was not in and of itself the "actionable harm." Rather, *that* harm occurred when "defendants' actions allegedly interfered with the interests of a plaintiff as a member, making the plaintiff eligible to receive some form of relief under MCL 450.4515(1)." *Id*.

The Agency analogizes this case to *Frank*, arguing that the deprivation of property is comparable to the calculable financial injury in *Frank*, i.e., that the deprivation of property is merely the result of the deprivation of process, which constitutes the "actionable harm" for a claim alleging a violation of due process. However, unlike a claim for LLC member oppression under MCL 450.4515—in which the harm itself can occur before incurring a calculable financial injury—no harm for a violation of due process can occur without or before a deprivation of property. *Bonner*, 495 Mich at 225-226; *Williams*, 430 Mich at

610. Indeed, absent such a deprivation, it would often be impossible to determine whether sufficient process had been provided to a person, as the state could provide additional process before the actual deprivation or elect not to deprive that person of property at all, in which case no harm would occur. Thus, while the "actionable harm" in *Frank* occurred independently from the calculable financial injury, the "actionable harm" in a due-process claim is specifically triggered by a deprivation of property.

Accordingly, the Court of Appeals erred by holding that plaintiffs' due-process claims seeking monetary relief accrued when plaintiffs were deprived of process. Rather, these claims accrued only when they were deprived of property, as they incurred no harm before that deprivation. Because the accrual under MCL 600.5827 of a due-process claim seeking monetary relief "giv[es] rise to [a] cause of action" for purposes of MCL 600.6431(3), the six-month period from MCL 600.6431(3) was triggered when plaintiffs were deprived of property.

C. APPLICATION

Plaintiffs allege that they were first deprived of property when their tax refunds were seized or their wages garnished. The Agency does not dispute that the seizure of tax refunds and garnishment of wages constitute deprivations of property, but argues that plaintiffs were *first* deprived of property either when the initial redetermination notices were sent informing plaintiffs of liability or, at the latest, when plaintiffs received the Agency's notices of an intention to intercept their tax refunds or wages.[14] However, the Agency

[14] The Agency does not argue that plaintiffs possessed a property interest in the continued receipt of future unemployment compensation,

provides no support for its argument that either the redetermination notices or the notices of intent actually *deprived* plaintiffs of their property, rather than merely notifying them of the Agency's future intent to take their property. The Agency's notices of redetermination merely apprised plaintiffs of the amount owed to the Agency; these did not actually seize plaintiffs' property. See *Jones v Clark Co*, 666 F Appx 483, 486 (CA 6, 2016) ("[Plaintiff] does not have a property interest in not being billed. . . . An erroneously high bill from the government, without more, does not deprive the bill's recipient of a protected property interest[.]").[15] Similarly, the notices of intent advised plaintiffs of what the Agency *will* (at some future time) undertake if a payment is not made, i.e., that a tax refund *will* be seized or that wages *will* be garnished,

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and therefore we decline to reach that issue. Even assuming that one could have a property interest in the continued receipt of future unemployment compensation, Bauserman and Broe were not seeking additional compensation when the Agency's redeterminations were issued. Accordingly, they were not deprived of any property until their tax refunds were seized.

[15] For example, Bauserman's "notice of redetermination" regarding alleged fraud provided:

> Your actions indicate you intentionally misled and/or concealed Information to obtain benefits you were not entitled to receive.
>
> Benefits will be terminated on any claims active on December 28, 2013.
>
> You are disqualified for benefits under MES Act, Sec. 62(b). Restitution is due under MES Act, Sec. 62(a). The wages used to establish your claim are cancelled and no further benefits will be paid based on those wages. In addition, you are required to pay the penalty assessed based on this determination under MES Act, Sec. 54(b). . . .
>
> * * *
>
> If you disagree with this redetermination, refer to Appeal Rights on the reverse side of this form.

but again these did not actually deprive plaintiffs of their property.[16] See *Millar v Clark Construction Auth*, 501 Mich 233, 239; 912 NW2d 521 (2018) ("At the time each letter was written, the plaintiff had no actionable WPA claim because no allegedly discriminatory action had occurred; the defendants *intended* to curtail the plaintiff's employment responsibilities, but had not taken any action to implement that intent."). Absent any indication that the Agency's notifications contemporaneously impaired plaintiffs' property interests, we cannot conclude that such notices triggered the "actionable harm" for a claim alleging a violation of due process.[17]

With regard to plaintiff Bauserman, he first incurred a deprivation of property on June 6, 2015, when the Agency intercepted his federal and state income tax refunds. Accordingly, his September 9, 2015 complaint was timely filed "within 6 months following the

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[16] The "notice[s] of intent to reduce/withhold federal income tax refund" provided:

> If you do not pay the amount shown or take other action described below within 60 days of the mail date on this form, the [Agency] *will* submit this benefit overpayment balance (restitution) to . . . the United States Department of Treasury . . . [which] *will* reduce or withhold any federal income tax refund you may be due and will instead forward that amount to the [Agency.] [Emphasis added.]

[17] This Court has previously held that it "is beyond dispute that a money judgment rendered in . . . litigation against the defendant would deprive it of property." *Williams*, 430 Mich at 611. Accordingly, we do not hereby imply that the "actionable harm" in a due-process claim can *only* occur when collection proceedings begin. However, merely expressing a *future* intent to deprive one of property is an insufficient triggering event. See *Jones*, 666 F Appx at 486; *Millar*, 501 Mich at 239. Because the notices at issue only reflect a future intent to seize property, and because the Agency has offered no persuasive argument that the notices *actually* deprived plaintiffs of their property, these did not trigger the six-month notice period under MCL 600.6431(3).

happening of the event giving rise to the cause of action." MCL 600.6431(3). Similarly, plaintiff Broe first incurred a deprivation of property when his tax refunds were seized in May 2015, and therefore his claim against the Agency was also timely filed under MCL 600.6431(3).[18] However, plaintiff Williams first incurred a deprivation of property when his wages were garnished on May 16, 2014, and his claim was not filed within six months of that deprivation.[19] Thus, plaintiffs Bauserman and Broe timely filed their claims, while plaintiff Williams did not.

IV. CONCLUSION

It is yet to be determined whether plaintiffs will succeed on their claims against the Agency. However, plaintiffs Bauserman and Broe did timely comply with the notice requirements of MCL 600.6431(3) and therefore are not procedurally barred on that basis from the substantive consideration of their claims. We thus affirm in part and reverse in part the judgment of the Court of Appeals and remand to that Court for further proceedings consistent with this opinion.[20]

MCCORMACK, C.J., and ZAHRA, VIVIANO, BERNSTEIN, and CLEMENT, JJ., concurred with MARKMAN, J.

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[18] This is true regardless of whether the time elapsed is calculated as ending upon the filing of Bauserman's complaint or upon the filing of the amended complaint on October 19, 2015, which added Broe as a named plaintiff to the action.

[19] Williams's claim was untimely regardless of whether the triggering event was the termination of his receipt of future unemployment compensation or the later garnishment of his wages and interception of his tax refund. Moreover, Williams has not argued that each garnishment of his wages "g[ave] rise to" a new cause of action.

[20] On remand, the Court of Appeals should consider the Agency's argument that it is entitled to summary disposition on the ground that plaintiffs failed to raise cognizable constitutional tort claims.

MCCORMACK, C.J. (*concurring*). I concur in the majority opinion. If MCL 600.6431(3)'s sixth-month notice period governs the plaintiffs' claims, it started to run when the state deprived the plaintiffs of a property interest without due process. I write separately, however, because I am not convinced that our strict-compliance rule from *McCahan* and *Rowland* for notice of statutorily created claims applies to a due-process claim in particular, or to constitutional tort claims at all. If a different standard governs a due-process claim, then Mr. Williams's claim might also survive. But since Mr. Williams has not made this argument, I join the majority opinion's result.

We held in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), that a suit may be dismissed for failure to comply with a statutory notice requirement even if the defendant was not prejudiced by the lack of notice, abrogating our precedent holding notice requirements unconstitutional with no actual prejudice. We reasoned that "inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits." *Rowland*, 477 Mich at 212. In other words, when the government waives its immunity from suit, it may do so on its own terms, subject only to rational-basis review. And the notice provision survived our rational-basis review.

Our opinion in *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012), followed. We explained that it is "the sole province of the Legislature to determine whether and on what terms the state may be sued" and that "the judiciary has no authority to restrict or amend those terms." *Id*. at 732. And so we extended the *Rowland* rule to apply to the notice provision in MCL

600.6431 (the same Court of Claims notice provision at issue) and other statutory notice or filing provisions like it. *Id*. at 732-733.

But we have not held that the same is true of constitutional claims generally, or due-process claims in particular.[1] And I'm not sure we should: *Rowland*'s governmental-immunity rationale is less persuasive in the constitutional context. The *Rowland* and *McCahan* plaintiffs' substantive claims (for personal injuries resulting from a defective highway condition in *Rowland*, and for automobile tort liability in *McCahan*) existed only by legislative grace—there is no constitutional guarantee of safe roads or payment of personal injury benefits. The state enjoys broad immunity from suit unless it waives its immunity by creating a statutory right of action; the Legislature may place whatever conditions it wishes on rights of its own creation, including a notice requirement. And courts shouldn't undermine those legislatively created conditions.

But it is the Constitution that forbids the government from depriving a person of his property without due process of law. The Legislature is not the source of the due-process right (more often its target), so the fundamental principle that animated our decisions in *Rowland* and *McCahan* isn't implicated here. Whether and how much the Legislature can limit a person's ability to pursue a due-process claim is a first-principles question: A strict-compliance interpretation of the MCL 600.6431(3) notice requirement applied to a due-process

[1] As the majority explains, the Court of Appeals did so in *Rusha v Dep't of Corrections*, 307 Mich App 300; 859 NW2d 735 (2014); see also *Mays v Snyder*, 323 Mich App 1, 30-37; 916 NW2d 227 (2018) (affirming a denial of summary disposition because application of the notice provision would have divested the plaintiffs of the ability to vindicate alleged constitutional violations by depriving them of access to the courts).

claim will permit the Legislature to burden or curtail constitutional rights.[2] How much of a burden is too much?

To be sure, the due-process right, like any other constitutional right, is not absolute. "A constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise." *Block v North Dakota*, 461 US 273, 292; 103 S Ct 1811; 75 L Ed 2d 840 (1983) (citations omitted). Constitutional remedies may be "subject to a reasonable time bar designed to protect other important societal values." *Hair v United States*, 350 F3d 1253, 1260 (CA Fed, 2003). The Legislature may, at its discretion, restrict or change "the forms of action or modes of remedy . . . provided adequate means of enforcing the right remain. In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable." *Terry v Anderson*, 95 US 628, 633; 24 L Ed 365 (1877).

But that's the question: is the six-month, no-exceptions notice provision reasonable when the government has taken a person's property without due process?[3] The answer matters for Mr. Williams. Hypo-

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[2] Of course MCL 600.6431(3) requires only that *notice* of a claim be filed within six months; and the complaint itself must be filed within three years. But in many cases, claims may be time-barred by the initial notice requirement before a victim ever realizes she was harmed. Some "deprivations, such as those involving denial of due process or of equal protection, will be far more subtle" than a more obvious tort like a battery. *Felder v Casey*, 487 US 131, 146 n 3; 108 S Ct 2302; 101 L Ed 2d 123 (1988). "In the latter, and by no means negligible, category of constitutional injuries, victims will frequently fail to recognize within the 4-month statutory period that they have been wronged at all." *Id.*

[3] It's no secret that notice-of-claim statutes burden claimants' rights—that's the point. Notice-of-claim statutes are "designed to minimize governmental liability . . . ." *Felder*, 487 US at 153. And although notice-

theticals show why it's a hard question: If the Legislature enacted a statute that required me to notice my intent to challenge a local ordinance that limits gun ownership to one weapon per household within 24 hours of having my weapon confiscated, we would surely be troubled by that barrier to my ability to vindicate my Second Amendment rights. And likewise if I wait 50 years to complain that denial of a park permit for my annual church picnic violated the First Amendment, we would think it unfair for the government to be on the hook when there is likely no information available or witnesses around to contest the complaint. I don't know where this six-month notice period for a claim that the state has taken my tax refund without due process falls on that continuum.

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of-claim statutes can shield the state against statutory claims, they may have to yield to higher authorities like the Constitution or federal law. For example, the United States Supreme Court has held that such abbreviated periods for bringing claims conflict with 42 USC 1983 and thus are preempted by federal law. The Court held that Wisconsin could not apply its four-month notice period to bar § 1983 claims in its state courts:

> A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. [*Felder*, 487 US at 153.]

Similarly, the Court overruled a Maryland case that applied the state's six-month limitations period to an employment discrimination case under the Civil Rights Act:

> [T]he legislative choice of a restrictive 6-month limitations period reflects in part a judgment that factors such as minimizing the diversion of state officials' attention from their duties outweigh the interest in providing employees ready access to a forum to resolve valid claims. That policy is manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes, which is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. [*Burnett v Grattan*, 468 US 42, 54-55; 104 S Ct 2924; 82 L Ed 2d 36 (1984).]

Mr. Williams has not challenged the application of MCL 600.6431(3) to his due-process claims; he has instead conceded that the six-month notice period for property damage or personal injury applies to his claims. Given that, I agree with the majority that Mr. Williams's claim is untimely because he failed to file notice within six months of the May 2014 garnishment, when he first suffered a deprivation of property.

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

STENZEL v BEST BUY CO, INC

Docket No. 156262. Argued March 7, 2019 (Calendar No. 2). Decided April 22, 2019.

Paulette Stenzel brought an action in the Ingham Circuit Court against Best Buy Co., Inc. Best Buy filed a notice identifying Samsung Electronics America, Inc., as a nonparty at fault. Plaintiff added a claim against Samsung in an amended complaint. Samsung moved for summary disposition, arguing that plaintiff's claim against it was untimely because plaintiff had not first moved to amend under MCL 600.2957(2). The court, Rosemarie E. Aquilina, J., granted summary disposition in favor of Best Buy and Samsung. Plaintiff appealed, and the Court of Appeals affirmed in part, holding that Samsung was not properly added as a party because plaintiff did not file a motion to amend. 318 Mich App 411 (2016). The Court of Appeals subsequently vacated Part II(C) of the *Stenzel* opinion and convened a special conflict panel. 318 Mich App 801 (2017). The Court of Appeals special conflict panel reversed and remanded, holding that a conflict exists between MCR 2.112(K)(4) and MCL 600.2957(2) with respect to the procedure to amend a pleading to add an identified nonparty at fault to an action and that *Williams v Arbor Home, Inc*, 254 Mich App 439 (2002), had to be overruled to the extent that it held otherwise. 320 Mich App 262 (2017). However, the Court held that the relation-back provision of MCL 600.2957(2) was fully applicable, regardless of the fact that MCR 2.112(K)(4) ultimately controlled the process with respect to amending a pleading to add an identified nonparty at fault, and, therefore, plaintiff was entitled to the protection of the relation-back provision in MCL 600.2957(2). Judge GLEICHER, joined by Presiding Judge SERVITTO and Judge SHAPIRO, concurred in the result, concluding that no irreconcilable conflict exists between the statute and court rule, that plaintiff was permitted to amend her complaint upon receipt of notice of nonparty fault without first filing a motion for leave to amend, and that the amended pleading related back to the original action. Samsung sought leave to appeal in the Supreme Court, and the Supreme Court granted leave to appeal. 501 Mich 1042 (2018).

In a unanimous memorandum opinion, the Supreme Court *held*:

The Court of Appeals decision was affirmed for the reasons set forth in Judge GLEICHER's concurring opinion. MCL 600.2957(2) and MCR 2.112(K) do not irreconcilably conflict, a party may amend a pleading upon receipt of notice of nonparty fault pursuant to MCR 2.112(K) without filing a motion for leave to amend, and the amended pleading relates back to the original action pursuant to MCL 600.2957(2). The two provisions are entirely consistent with regard to the central and controlling issue: a plaintiff's right to timely amend a complaint to add an identified nonparty at fault as a party. Read together, the two provisions permit a plaintiff to file a motion to amend, or not. Either way, the result is the same: the amendment must be permitted if it is timely. The Supreme Court promulgated MCR 2.112(K)(4) to implement MCL 600.2957, not to supplant it. Moreover, the court rule addresses the conduct of the parties, whereas the statute is directed at the conduct of the court. Accordingly, the two provisions exist in a consistent and complementary fashion. As a result, plaintiff was permitted to amend the complaint without first filing a motion for leave to amend. Because the statute and court rule are complementary, the statute fills in for the court rules' silence on the subject of "relation back." Accordingly, plaintiff's amended complaint adding Samsung as a defendant related back to her original complaint against Best Buy under MCL 600.2957(2) and was timely filed.

Affirmed and remanded to the trial court for further proceedings.

Justice CAVANAGH did not participate due to her prior relationship with Garan Lucow Miller, PC.

PLEADING — STATUTES — COURT RULES — PROCEDURE FOR AMENDING A PLEADING TO ADD AN IDENTIFIED NONPARTY AT FAULT TO AN ACTION.

MCL 600.2957(2) provides that upon motion of a party within 91 days after identification of a nonparty at fault, the court shall grant leave to the moving party to file and serve an amended pleading alleging one or more causes of action against that nonparty and that a cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action; MCR 2.112(K)(4) provides, in relevant part, that a party served with a notice under this subrule may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying

that nonparty; MCL 600.2957(2) and MCR 2.112(K) do not irreconcilably conflict because they are entirely consistent with regard to the central and controlling issue: a plaintiff's right to timely amend a complaint to add an identified nonparty at fault as a party; the court rule address the conduct of the parties, whereas the statute is directed at the conduct of the court; a party may amend a pleading upon receipt of notice of nonparty fault pursuant to MCR 2.112(K) without filing a motion for leave to amend, and the amended pleading relates back to the original action pursuant to MCL 600.2957(2).

Nolan, Thomsen & Villas, PC (by *Lawrence P. Nolan* and *Gary G. Villas*) for Paulette Stenzel.

Dykema Gossett PLLC (by *Paul L. Nystrom* and *Jill M. Wheaton*) for Samsung Electronics America, Inc.

Amicus Curiae:

Kerr Russell and Weber, PLC (by *Daniel G. Beyer* and *Derek R. Boyd*) for Michigan Defense Trial Counsel, Inc.

MEMORANDUM OPINION. Plaintiff was injured after her new refrigerator began to spray water out of its water dispenser onto her kitchen floor, causing her to slip and fall. She filed a timely complaint alleging negligence, breach of contract, and breach of warranty against defendant Best Buy Co., Inc., which had sold and installed the refrigerator. Best Buy filed a notice of nonparty fault, identifying defendant-appellant Samsung Electronics America, Inc., as the refrigerator's manufacturer. Plaintiff added a claim against Samsung in an amended complaint, and Samsung moved for summary disposition, arguing that plaintiff's claim against it was untimely because plaintiff had not first moved to amend under MCL 600.2957(2) and therefore was not entitled to the relation-back privilege set forth

in that statute. The trial court granted Samsung's motion, but the Court of Appeals reversed.

We affirm the Court of Appeals for the reasons set forth in the concurring opinion, *Stenzel v Best Buy Co, Inc*, 320 Mich App 262, 284; 906 NW2d 801 (2017) (GLEICHER, J., concurring in result), and remand to the trial court for further proceedings consistent with this opinion. Specifically, we conclude that MCL 600.2957(2)[1] and MCR 2.112(K)[2] do not irreconcilably conflict, a party may amend a pleading upon receipt of notice of nonparty fault pursuant to MCR 2.112(K) without filing a motion for leave to amend, and the amended pleading relates back to the original action pursuant to MCL 600.2957(2).

In particular, the concurring opinion correctly concluded that the statute and the court rule "are capable of harmonious coexistence" and do not " 'irreconcilabl[y] conflict.' " *Stenzel*, 320 Mich App at 287, 288 (GLEICHER, J., concurring in result), quoting *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012); MCL 600.2957(2) (specifying that if a party moves to amend a pleading within 91 days after the identification of a nonparty at fault, the court shall grant it and the amended pleading will relate back to the time of the filing of the original pleading); MCR 2.112(K)(4)

[1] MCL 600.2957(2) provides:

> Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

[2] MCR 2.112(K)(4) provides, in relevant part, that "a party served with a notice under this subrule may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty."

(affording a party served with notice of identification of a nonparty at fault the right to amend a pleading to add that nonparty to the suit). Rather, "the statute and court rule at issue here are . . . complementary." *Stenzel*, 320 Mich App at 290 (GLEICHER, J., concurring in result). The two provisions at issue

> are entirely consistent with regard to the central and controlling issue: a plaintiff's right to timely amend a complaint to add an identified nonparty at fault as a party. Read together, the two provisions permit a plaintiff to file a motion to amend, or not. Either way, the result is the same: the amendment must be permitted if it is timely. [*Id*. at 289.]

Moreover, "the [Michigan] Supreme Court understood that a timely request to amend had to be granted." *Id*. Therefore, this Court "promulgated MCR 2.112(K)(4) 'to implement MCL 600.2957,' " not to supplant it. *Id*. at 288, quoting *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 324; 661 NW2d 248 (2003). For "[t]he court rule addresses the conduct of the parties," whereas "the statute is directed at the conduct of the court." *Bint v Doe*, 274 Mich App 232, 237-238; 732 NW2d 156 (2007) (ZAHRA, P.J., concurring). Accordingly, the two provisions exist in a "consistent" and complementary fashion, and they do not conflict. *Id*. at 238.

As a result, "[a] plaintiff may elect to amend the complaint [without filing a motion for leave to amend]. If the plaintiff so elects, the court shall grant the amendment." *Id*. Alternatively, "[i]f a plaintiff wishes to file a motion to add a nonparty," the plaintiff is permitted to do so under MCL 600.2957(2). *Stenzel*, 320 Mich App at 290 (GLEICHER, J., concurring in result). These constitute "alternative methods of accomplishing the same goal . . . ." *Id*. Therefore, in the present case, "plaintiff was permitted . . . to file her amended complaint with or without first filing a mo-

tion to amend," and she properly added Samsung as a party by filing an amended complaint. *Id*. at 291-292. Furthermore,

> [t]here being no conflict between the statute and the court rule, we are bound to implement the remainder of MCL 600.2957(2), which provides that a "cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action."
>
> Applying this statutory provision to the facts of the present case, it is clear that the cause of action asserted against defendant[] . . . is timely because the claim against defendant[], had it been asserted in the original action, would have been timely. [*Bint*, 274 Mich App at 238 (ZAHRA, P.J., concurring).]

Samsung disagrees, contending that the relation-back privilege in MCL 600.2957(2) is contingent upon a party filing a motion for leave to amend "under this subsection." However, we are in agreement with the concurring opinion that, because "the statute and court rule . . . are . . . complementary," "[t]he statute fills in for the court rules' silence on [the] subject" of "relation back." *Stenzel*, 320 Mich App at 290, 291 (GLEICHER, J., concurring in result). Accordingly, plaintiff's amended complaint adding Samsung as a defendant relates back to her original complaint against Best Buy under MCL 600.2957(2) and was timely filed.

We affirm the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, and CLEMENT, JJ., concurred.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, PC.

PEOPLE v MEAD

Docket No. 156376. Argued on application for leave to appeal October 24, 2018. Decided April 22, 2019.

Larry G. Mead was convicted following a jury trial in the Jackson Circuit Court, Thomas D. Wilson, J., of possession of methamphetamine, MCL 333.7403(2)(b)(*i*), as a fourth-offense habitual offender, MCL 769.12. Defendant was a passenger in a vehicle that had been pulled over by a police officer for an expired license plate. As the officer asked the driver for her license and registration, the officer observed defendant clutching a black backpack on his lap while sitting in the passenger seat. The officer asked the driver to step outside the car, and they were outside defendant's earshot when the officer asked her how she knew defendant. The driver answered that she and defendant had just met; they were traveling in the same direction, and she had agreed to drop him off on her way. The officer obtained the driver's consent to search her person and the vehicle. The officer returned to the car and asked defendant to exit the vehicle. Defendant left his backpack on the passenger floorboard before stepping outside. The officer asked defendant how he knew the driver, and defendant confirmed that they had just met and that she had offered to give him a ride. Defendant gave the officer permission to frisk him for narcotics and weapons. The officer then asked defendant to step away from the vehicle, and the officer searched the passenger side of the vehicle, including defendant's backpack, which contained a digital scale, 5 prescription pills, 9.8 grams of marijuana, and 4.03 grams of methamphetamine. Defendant acknowledged that the backpack was his, and he was arrested. At the preliminary hearing, the officer testified that the driver did not give explicit consent to search the backpack (only the vehicle) and that he did not separately seek defendant's consent to search the backpack. The officer also testified that he believed (but did not confirm) that the backpack belonged to defendant because defendant was hugging it in his lap. Defendant was bound over for trial. In the circuit court, defendant moved to suppress the evidence of methamphetamine in his backpack as the fruit of an illegal search. The court denied the motion, citing *People v LaBelle*, 478 Mich 891 (2007). Defendant was convicted and sentenced to serve 2 to 10

years in prison. Defendant appealed in the Court of Appeals. A unanimous panel of the Court of Appeals affirmed in an unpublished per curiam opinion issued on September 13, 2016 (Docket No. 327881), concluding that because the *LaBelle* order held that the defendant in *LaBelle* lacked standing to contest the search of a backpack after the driver consented to the search, the trial court properly denied defendant's motion to suppress the evidence. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court, in lieu of granting leave to appeal, vacated the Court of Appeals decision and remanded to that Court with directions to consider whether the *LaBelle* order was distinguishable, whether the record demonstrated that the police officer reasonably believed that the driver had common authority over the backpack in order for the driver's consent to justify the search under *Illinois v Rodriguez*, 497 US 177 (1990), and whether there were any other grounds upon which the search might be justified. 500 Mich 967 (2017). On remand, the Court of Appeals again affirmed defendant's conviction and sentence, holding that the case could not be distinguished from *LaBelle*, that *Rodriguez*'s common-authority framework did not apply to third-party consent searches of containers in automobiles in Michigan, and that no other grounds justified the search. 320 Mich App 613 (2017). Defendant again sought leave to appeal in the Supreme Court, and the Supreme Court ordered oral argument on the application and directed supplemental briefing.

In a unanimous opinion by Chief Justice MCCORMACK, in lieu of granting leave to appeal, the Supreme Court *held*:

A passenger's personal property is not subsumed by the vehicle that carries it for Fourth Amendment purposes. Accordingly, *People v LaBelle*, 478 Mich 891 (2007), was overruled; in its place, the following standard applies: a person may challenge an alleged Fourth Amendment violation if that person can show under the totality of the circumstances that he or she had a legitimate expectation of privacy in the area searched and that his or her expectation of privacy was one that society is prepared to recognize as reasonable.

1. The Fourth Amendment of both the United States and Michigan Constitutions protects against unreasonable searches and seizures. To invoke the Fourth Amendment's protections, a defendant must first establish that he or she had a legitimate expectation of privacy in the area searched. Moreover, the expectation of privacy must be one that society is prepared to recognize as reasonable. Courts must consider the totality of the circumstances in determining whether a defendant had a legitimate

expectation of privacy in the area searched. In the usual case, a passenger will not have a legitimate expectation of privacy in someone else's car. However, a person may challenge an alleged Fourth Amendment violation if that person can show under the totality of the circumstances that he or she had a legitimate expectation of privacy in the area searched and that his or her expectation of privacy was one that society is prepared to recognize as reasonable. Accordingly, *LaBelle*'s holding—that "[b]ecause the stop of the vehicle was legal, the defendant, a passenger, lacked standing to challenge the subsequent search of the vehicle"—was overruled. In this case, defendant had a legitimate expectation of privacy in his backpack. Defendant asserted a clear possessory interest in his backpack by clutching it in his lap, and the officer believed that the backpack belonged to defendant because of the way defendant was holding it. Therefore, although defendant had no (and claimed no) legitimate expectation of privacy in the interior of the driver's vehicle, he had a legitimate expectation of privacy in his backpack that society is willing to recognize as reasonable. Defendant was allowed to challenge the search of his backpack on Fourth Amendment grounds.

2. The Fourth Amendment proscribes only unreasonable searches. And searches based on consent are often reasonable. Unless a defendant can identify a flaw in the grant of consent that renders the search unreasonable, consensual searches are wholly valid. There are three ways a court may find that a consent search was unreasonable: consent was not voluntary, the consent-giver lacked authority, or the scope of the search exceeded the consent. It is the prosecution's burden to prove that consent was freely and voluntarily given. Finally, a search is not valid if police obtained permission to search from a third party who lacked the actual or apparent authority to give consent. In this case, the driver's consent to search the car was voluntary. However, an objectively reasonable police officer would not have believed that the driver had actual or apparent authority over defendant's backpack. The officer testified that he believed the backpack belonged to defendant, and no evidence suggested that the driver had mutual use of the backpack. A backpack is used to transport personal items, which suggests individual ownership rather than common ownership. Moreover, the officer knew at the time of the search that the driver and defendant had just met earlier that night and that the driver was simply giving defendant a ride. Given that brief relationship, a reasonable officer could not conclude that the driver had mutual use of defendant's backpack. And because the driver lacked apparent authority to consent to the search of the backpack, the scope of her consent was irrelevant. Accordingly,

the search of the backpack was not based on valid consent and was per se unreasonable. No other exception to the warrant requirement applied. Therefore, the warrantless search of defendant's backpack violated his Fourth Amendment rights.

Court of Appeals opinion reversed, trial court order denying defendant's motion to suppress vacated, and case remanded to the trial court for further proceedings.

Justice CAVANAGH did not participate in the disposition of this case because the Court considered it before she assumed office.

CONSTITUTIONAL LAW — FOURTH AMENDMENT — VEHICLES — PERSONAL PROPERTY OF A PASSENGER.

A passenger's personal property is not subsumed by the vehicle that carries it for Fourth Amendment purposes; a person may challenge an alleged Fourth Amendment violation if that person can show under the totality of the circumstances that he or she had a legitimate expectation of privacy in the area searched and that his or her expectation of privacy was one that society is prepared to recognize as reasonable.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Michael A. Faraone, PC (by *Michael A. Faraone*) for defendant.

MCCORMACK, C.J. The defendant was a passenger in a car when the police pulled it over, ordered him out, and searched his backpack. He thinks that search was unconstitutional. A straightforward application of well-settled Fourth Amendment jurisprudence—complicated only by a peremptory order of this court, *People v LaBelle*, 478 Mich 891 (2007)—says he's right.

We overrule *LaBelle*, conclude that the defendant had a legitimate expectation of privacy in his backpack, and hold that the warrantless search of the defendant's backpack was unreasonable because the driver lacked apparent common authority to consent to

the search. And we therefore reverse the opinion of the Court of Appeals, vacate the trial court order denying the defendant's motion to suppress, and remand the case to the Jackson Circuit Court for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In May 2014, Jackson Police Officer Richard Burkart pulled over Rachel Taylor for driving with an expired plate. As he approached the car to ask for Taylor's license and registration, Burkart observed the defendant, Larry Gerald Mead, in the passenger seat, clutching a black backpack on his lap.

Burkart asked for identification from both and determined through a database search that neither had an outstanding warrant. Although Taylor had admitted that she did not have a valid driver's license, Burkart decided that he would not arrest her but would try to get her permission to search the car. Burkart asked Taylor to step out of the car, out of the defendant's earshot. (Burkart later testified that he "typically" pulls the driver aside to obtain consent because "that way you can get an answer from them that's not influenced by the other people that may be in [the] car.") After a brief conversation, Burkart learned that Taylor had just met the defendant—they were traveling the same direction, and she had agreed to drop the defendant off on her way. Burkart obtained Taylor's consent to search her person and the vehicle.

Once Burkart had obtained Taylor's consent to search, he returned to the car and asked the defendant to get out. The defendant left his backpack on the passenger floorboard before stepping outside.[1] He per-

[1] The defendant claimed that Burkart ordered him to leave the backpack in the car. Burkart did not recall doing so.

mitted Burkart to frisk him for narcotics and weapons. Burkart also asked the defendant how he knew Taylor. The defendant confirmed that they had met that night at a mutual friend's home and that Taylor had let him hitch a ride.

Burkart requested that the defendant step away from the vehicle, and Burkart then began to search the passenger side. He opened the defendant's backpack and inside found a digital scale, 5 prescription pills, 9.8 grams of marijuana, and 4.03 grams of methamphetamine. The defendant acknowledged the backpack was his and was arrested. He was charged as a fourth-offense habitual offender, MCL 769.12, with possession of methamphetamine, MCL 333.7403(2)(b)(*i*).

Officer Burkart testified at the defendant's preliminary examination that Taylor did not give explicit consent to search the backpack (only the vehicle) and that he did not separately seek the defendant's consent to search the backpack. Burkart also testified that he believed (but did not confirm) that the backpack belonged to defendant because he was hugging it in his lap.

The defendant was bound over for trial. In the circuit court, he moved to suppress the evidence of methamphetamine in his backpack as the fruit of an illegal search. The trial court denied his motion, citing this Court's peremptory order in *People v LaBelle*, 478 Mich 891. The defendant was convicted by a jury and sentenced to serve 2 to 10 years in prison.

The defendant appealed. A unanimous panel of the Court of Appeals affirmed, holding that the trial court properly denied defendant's motion to suppress the evidence because our *LaBelle* order held that the defendant lacked standing to contest the search of the backpack after the driver consented to the search of

the car. *People v Mead*, unpublished per curiam opinion of the Court of Appeals, issued September 13, 2016 (Docket No. 327881). The defendant sought leave to appeal in this Court. In lieu of granting leave to appeal, we vacated the Court of Appeals decision and remanded to that Court with directions to consider: "(1) whether this Court's peremptory order in *People v LaBelle*, 478 Mich 891 (2007), is distinguishable; (2) whether the record demonstrates that the police officer reasonably believed that the driver had common authority over the backpack in order for the driver's consent to justify the search, see *Illinois v Rodriguez*, 497 US 177, 181, 183-189; 110 S Ct 2793; 111 L Ed 2d 148 (1990); and (3) whether there are any other grounds upon which the search may be justified." *People v Mead*, 500 Mich 967, 967 (2017).

On remand, the Court of Appeals again affirmed the defendant's conviction and sentence, holding that the defendant's case could not be distinguished from *LaBelle*, that *Rodriguez*'s common-authority framework does not apply to third-party consent searches of containers in automobiles in Michigan, and that no other grounds justified the search. *People v Mead (On Remand)*, 320 Mich App 613, 617, 621, 627; 908 NW2d 555 (2017). Defendant again sought leave to appeal in this Court. We ordered oral argument on the application and directed supplemental briefing on these issues:

> (1) whether *Illinois v Rodriguez*, 497 US 177, 181, 183-189; 110 S Ct 2793; 111 L Ed 2d 148 (1990), should control the resolution of the question whether the police officer had lawful consent to search the backpack found in the vehicle; (2) whether the record demonstrates that the officer reasonably believed that the driver had common authority over the backpack in order for the driver's consent to justify the search; and (3) whether there are any other grounds upon which the search may be justified

or the evidence may be deemed admissible. [*People v Mead*, 501 Mich 1029, 1030 (2018).]

II. ANALYSIS

To resolve this case, we must determine whether the challenged search infringed an interest the Fourth Amendment was designed to protect, and if so, whether the search complied with the Fourth Amendment. But we cannot address those questions without first ironing out a wrinkle in our jurisprudence—our peremptory order in *People v LaBelle*. In *LaBelle*, we held that passengers categorically lack "standing" to challenge a search of the vehicle in which they were traveling. We also held that the search of LaBelle's (the passenger's) backpack was valid because the officer had authority to search the passenger compartment (based on either the driver's consent or, in the alternative, as a search incident to arrest) and "[a]uthority to search the entire passenger compartment of the vehicle includes any unlocked containers located therein, including the backpack in this case." *LaBelle*, 478 Mich at 892. In so holding, *LaBelle* announced two black-and-white rules in an area of the law full of shades of gray. The Fourth Amendment demands nothing more or less than reasonableness. And reasonableness does not lend itself to bright-line rules.

A. "STANDING"

The Fourth Amendment of the United States Constitution—like Article 1, § 11 of the 1963 Michigan Constitution, whose protections have been construed as coextensive with its federal counterpart, see *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011)—protects against unreasonable searches and seizures. To invoke the Fourth Amendment's protections,

a defendant must first establish that he had a legitimate expectation of privacy in the area searched.[2] *Rakas v Illinois*, 439 US 128, 148-149; 99 S Ct 421; 58 L Ed 2d 387 (1978); *People v Smith*, 420 Mich 1, 17-18; 360 NW2d 841 (1984) (adopting the *Rakas* "legitimate expectation of privacy" test). Moreover, the expectation of privacy must be one that society is prepared to recognize as reasonable. *Smith*, 420 Mich at 28. Courts must consider the totality of the circumstances in determining whether a defendant had a legitimate expectation of privacy in the area searched. *Id*.

In the usual case, a passenger will not have a legitimate expectation of privacy in someone else's car. As *Rakas* explained, "a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy" in areas like the glove compartment or trunk. *Rakas*, 439 US at 148-149. But "*Rakas* did *not* hold that passengers cannot have an expectation of privacy in automobiles." *Byrd v United States*, 584 US ___, ___; 138 S Ct 1518, 1528; 200 L Ed 2d 805 (2018)

[2] Our *LaBelle* order referred to "standing." Although use of the term persists in search and seizure contests, *Rakas* "dispens[ed] with the rubric of standing" in the Fourth Amendment context. *Rakas*, 439 US at 140. Instead, the Court concluded that whether a defendant is "entitled to contest the legality of a search and seizure . . . belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing . . . ." *Id*. Thus:

> Analyzed in these terms, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect. [*Id*.]

Put another way, rather than framing it as a standing issue, the question is whether the defendant has stated a substantive Fourth Amendment claim on which relief may be granted.

(emphasis added). In short, the usual case is not every case; normally does not mean never.

Thus, we overrule *LaBelle*'s holding that "[b]ecause the stop of the vehicle was legal, the defendant, a passenger, lacked standing to challenge the subsequent search of the vehicle." *LaBelle*, 478 Mich at 892. In its place, we reaffirm that a person—whether she is a passenger in a vehicle, or a pedestrian, or a homeowner, or a hotel guest—may challenge an alleged Fourth Amendment violation if she can show under the totality of the circumstances that she had a legitimate expectation of privacy in the area searched and that her expectation of privacy was one that society is prepared to recognize as reasonable. *Smith*, 420 Mich at 28.

Applying that standard here, we conclude that the defendant had a legitimate expectation of privacy in his backpack. To begin with, this case differs from *Rakas* in one important way: the defendant challenges the search of a personal effect—his backpack. The Fourth Amendment specifically guarantees "[t]he right of the people to be secure in their persons, houses, papers, and *effects* . . . ." US Const, Am IV (emphasis added). And the record establishes that the defendant asserted a clear possessory interest in his backpack by clutching it in his lap. Burkart saw the defendant with "a black backpack sitting in his lap that he kind of had his arms around," and Burkart believed that the backpack belonged to the defendant because of the way the defendant was holding it. "[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude." *Rakas*, 439 US at 144 n 12; see also *Byrd*, 584 US at ___; 138 S Ct at 1528. And a passenger's personal property is not subsumed by the vehicle that carries it for Fourth Amendment purposes.

See, e.g., *United States v Welch*, 4 F3d 761, 764 (CA 9, 1993) ("The shared control of 'host' property does not serve to forfeit the expectation of privacy in containers within that property."), citing *United States v Karo*, 468 US 705, 725-727; 104 S Ct 3296; 82 L Ed 2d 530 (1984) (O'Connor, J., concurring). A person can get in a car without leaving his Fourth Amendment rights at the curb.

Thus, although the defendant had no (and claimed no) legitimate expectation of privacy in the interior of Taylor's vehicle, he had a legitimate expectation of privacy in his backpack that society is willing to recognize as reasonable. We reverse the Court of Appeals; the defendant may challenge the search of his backpack on Fourth Amendment grounds.

B. CONSENT

Because the search of the defendant's backpack "infringed an interest of the defendant which the Fourth Amendment was designed to protect," *Rakas*, 439 US at 140, we must decide whether the search was lawful. The defendant thinks not, but the prosecution believes that the driver's consent to search the car authorized the officer to search the defendant's backpack. The Fourth Amendment proscribes only unreasonable searches. And searches based on consent are often reasonable: "it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Florida v Jimeno*, 500 US 248, 250-251; 111 S Ct 1801; 114 L Ed 2d 297 (1991). Unless a defendant can identify a flaw in the grant of consent that renders the search unreasonable, consensual searches are "wholly valid." *Schneckloth v Bustamonte*, 412 US 218, 222; 93 S Ct 2041; 36 L Ed 2d 854 (1973).[3]

[3] We want to be precise in describing how the occurrence of the search

There are three ways a court may find that a consent search was unreasonable: consent wasn't voluntary, the consent-giver lacked authority, or the scope of the search exceeded the consent. It is the prosecution's burden to prove that consent was "freely and voluntarily given." *Bumper v North Carolina*, 391 US 543, 548; 88 S Ct 1788; 20 L Ed 2d 797 (1968). Likewise, an otherwise valid consensual search might be unreasonable if the officers exceeded the scope of that valid consent. *Jimeno*, 500 US at 250-251; see also 4 LaFave, Search & Seizure (5th ed), § 8.1, p 9 ("[T]he consenting party, either expressly or by implication, may place conditions upon the consent involving such matters as the time, duration, physical scope, or purpose of the search being consented to."). And a search is not valid if police obtained permission to search from a third party who lacked the actual or apparent authority to give consent. *Rodriguez*, 497 US at 181, 183-189.

Taylor's consent to search the car was voluntary. Only the latter two issues are in dispute: whether an objectively reasonable officer would conclude that Taylor had apparent common authority over the defendant's backpack, and whether the defendant's backpack was within the scope of her consent to search the car.

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in an automobile affects the analysis. That the search took place in a car is one fact that may inform whether, based on the totality of the circumstances, a defendant had a legitimate expectation of privacy in the place searched. The law recognizes that expectations of privacy are diminished in an automobile when compared, for example, to a home. *Byrd*, 584 US at ___; 138 S Ct at 1526. Once a court has determined that the defendant had a legitimate expectation of privacy in the place searched, however, there is no "automobile exception" to the requirements for a consent search. The same law governs consent searches whether the place to be searched is a person's pocket, car, or home. Thus we need not "extend" *Rodriguez* to the specific context of automobiles; it is already the rule from *Rodriguez*. See *Rodriguez*, 497 US at 188-189.

An officer must obtain consent to search from someone who has the authority to give it. Generally, that means either the property's owner or a third party who shares common authority over the property. In *Rodriguez*, the United States Supreme Court recognized one more source of consent—a third party with *apparent* common authority. The defendant in that case severely assaulted his girlfriend, Gail Fischer. The defendant and Fischer had lived together in an apartment. But Fischer had moved out almost a month before the assault, taking her clothing with her but leaving behind some furniture and household effects. Fischer led the police to the defendant's apartment, unlocked the door with her key, and gave the police permission to enter. The police arrested the defendant after observing drug paraphernalia and containers of cocaine in plain view. *Rodriguez*, 497 US at 179. The defendant sought to suppress the evidence, arguing that Fischer had no authority to consent to the police officers' entry.

The Court agreed with the defendant that the prosecution could not establish that Fischer had common authority over the premises. But it went on to hold that the search still could have been reasonable if Fischer *appeared* to have common authority—if the officers reasonably believed under the circumstances that Fischer had the authority to permit them to enter the defendant's apartment. *Rodriguez*, drawing on other Fourth Amendment jurisprudence, announced the following standard:

> As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' " that the consenting party had authority over the premises? *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968).

> If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid. [*Rodriguez*, 497 US at 188-189.]

Rodriguez is just one more application of the touchstone principle that governs all search and seizure questions—reasonableness.

On this point, we again break with *LaBelle*. There, we held that the search of the backpack was valid because the officer had the authority to search the car (either based on the driver's consent or as a search incident to arrest) and "[a]uthority to search the entire passenger compartment of the vehicle includes any unlocked containers located therein, including the backpack in this case." *LaBelle*, 478 Mich at 892. We presumably intended the quoted language to apply only to searches incident to arrest. For one, that was, in fact, the legal standard for a search incident to arrest when we issued the *LaBelle* order. *New York v Belton*, 453 US 454, 460-461; 101 S Ct 2860; 69 L Ed 2d 768 (1981) ("[T]he police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach."), abrogated by *Arizona v Gant*, 556 US 332 (2009). And we could not have imposed a bright-line rule like that for consent searches even if we wished—the consenting party defines the scope of her consent. *Jimeno*, 500 US at 251; *Rodriguez*, 497 US at 183-189.

But our order was not a model of clarity. So it is understandable that the trial court applied this rule to the consent search here. In any event, our *LaBelle* holding is now a dead letter in both contexts: *Gant* supplanted *Belton* for searches incident to arrest. And if we intended to graft the *Belton* standard onto con-

sent searches, we overrule it. We instead reaffirm that an officer must obtain consent from someone with the actual or apparent authority to give it, *Rodriguez*, 497 US at 188-189, that the scope of any consent search is defined by the consenting party, and that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness . . . ." *Jimeno*, 500 US at 251.

With these principles understood, we turn to the search here. An objectively reasonable police officer would not have believed that Taylor had actual or apparent authority over the defendant's backpack. Officer Burkart testified that he believed the backpack belonged to the defendant. No evidence suggested that Taylor had mutual use of the backpack. A backpack is used to transport personal items, which suggests individual ownership rather than common ownership. See *Utah v Harding*, 282 P3d 31, 38; 2011 UT 78 (2011). Burkart knew at the time of the search that Taylor and the defendant were near strangers. Taylor told Burkart that she had met the defendant earlier that night and that she was dropping him off somewhere on her way, and the defendant independently confirmed that.

Given this brief relationship, a reasonable officer could not conclude that Taylor had mutual use of the defendant's backpack. Taylor was like a rideshare driver who has only short-term contact with passengers—an objectively reasonable officer would not believe (absent unusual circumstances) that an Uber driver could consent to the search of his passenger's purse, for example. And since Taylor didn't have the apparent authority to consent to the search of the backpack, the scope of her consent is irrelevant. By definition, the scope of a person's consent cannot exceed her apparent authority to give that consent. See

Rodriguez, 497 US at 188 (cautioning that even when a third party explicitly consents to the search of a particular place, it is unreasonable to act on that consent if "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry").

Because Taylor did not have apparent common authority over the backpack, the search of the backpack was not based on valid consent and is per se unreasonable unless another exception to the warrant requirement applies. Officer Burkart conceded that he did not have probable cause to search or reasonable suspicion that the defendant or Taylor was armed. And we agree with the Court of Appeals that none of the other exceptions to the warrant requirement has been satisfied. We therefore hold that the warrantless search of the defendant's backpack was unreasonable and violated his Fourth Amendment rights.

III. CONCLUSION

For these reasons, we overrule *People v LaBelle*, 478 Mich 891 (2007), and hold that the search of the defendant's backpack violated the Fourth Amendment. Therefore, we reverse the opinion of the Court of Appeals, vacate the trial court order denying the defendant's motion to suppress, and remand to the trial court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, and CLEMENT, JJ., concurred with MCCORMACK, C.J.

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

PEOPLE v CARTER

Docket No. 156606. Argued on application for leave to appeal March 7, 2019. Decided May 7, 2019.

Alonzo Carter was convicted following a jury trial in the Wayne Circuit Court, Vonda R. Evans, J., of assault with intent to do great bodily harm (AWIGBH), MCL 750.84; felon in possession of a firearm (felon-in-possession), MCL 750.224f; intentional discharge of a firearm at a dwelling, MCL 750.234b; felonious assault, MCL 750.82; and carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm) second offense, MCL 750.227b. In January 2015, defendant was involved in a verbal altercation with Lawrence Sewell outside Sewell's apartment. Later that evening, defendant returned to Sewell's apartment and attempted to lure Sewell to the door by impersonating a maintenance worker. Sewell looked through the door's peephole and saw defendant waiting outside wearing a ski mask and holding a firearm. Sewell did not allow defendant to enter, and defendant fired three shots through the apartment door at chest level. Two shots skipped off the apartment floor and through a window, while another punctured an air mattress on which an infant child slept. None of the apartment's occupants was shot. Defendant was convicted as a fourth-offense habitual offender, and the trial court sentenced him to concurrent prison terms of 5 to 10 years for AWIGBH, 1 to 5 years for felon-in-possession, 1 to 10 years for intentional discharge of a firearm at a dwelling, and 1 to 4 years for felonious assault, all to be served consecutively to a two-year prison sentence (later corrected to a five-year prison sentence) for felony-firearm. Defendant moved to remand in the Court of Appeals, objecting to the assessment of points under Prior Record Variable (PRV) 1 (prior high severity felony convictions), MCL 777.51; Offense Variable (OV) 4 (psychological injury to the victim), MCL 777.34; and OV 12 (contemporaneous felonious acts), MCL 777.42. The Court of Appeals denied the motion. Defendant appealed in the Court of Appeals, contesting the trial court's scoring of the three sentencing variables. The prosecution conceded error with regard to the points assessed under OV 4 and PRV 1, but the prosecution defended the 10 points assessed under OV 12. In an unpublished per curiam opinion issued on June 27, 2017

(Docket No. 331142), the Court of Appeals, JANSEN, P.J., and MURPHY and BORRELLO, JJ., affirmed the scoring of OV 12, reasoning that each pull of the trigger was a separate act and that because only one act was needed to convict defendant, the other two acts of pulling the trigger constituted contemporaneous felonious criminal acts. Because removal of the points that were incorrectly assessed under OV 4 and PRV 1 did not affect the applicable guidelines minimum sentence range, the Court of Appeals did not order resentencing. Defendant sought leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1089 (2018).

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal, *held*:

OV 12 is governed by MCL 777.42, which states that it is appropriate to assess an offender 10 points when two contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(2)(a) provides that when assessing points under OV 12, a felonious criminal act is contemporaneous if both of the following circumstances exist: (*i*) the act occurred within 24 hours of the sentencing offense, and (*ii*) the act has not and will not result in a separate conviction. Because the Legislature used the word "act" in one portion of MCL 777.42(2)(a)(*i*) and the phrase "sentencing offense" later in the same sentence, the Legislature intended to draw a distinction between the two; what matters is whether the "sentencing offense" can be separated from other distinct "acts." In the context of OVs, "sentencing offense" is defined as the crime of which the defendant has been convicted and for which he or she is being sentenced. In this case, the sentencing offense was AWIGBH, and a finding that two of the gunshots were not part of the sentencing offense could not be supported by the evidence because the record showed that the prosecution relied on all three gunshots as evidence of defendant's intent to inflict great bodily harm. Those same three gunshots could not then be used to establish separate "acts" that occurred within 24 hours of the "sentencing offense" under MCL 777.42(2)(a)(*i*). Accordingly, it was inappropriate for the Court of Appeals to distinguish two gunshots from the conduct constituting the sentencing offense. Importantly, this holding was limited to the facts of this case; circumstances might exist under which multiple gunshots may constitute separate "acts" that are distinguishable from the "sentencing offense," but this case did not present those circumstances. Finally, reduction of defendant's variable score to account for the improper assessment of points

under OV 12 altered the recommended guidelines minimum sentence range; although defendant's sentence fell within the proper guidelines range, defendant was entitled to resentencing under accurately scored offense variables because the scoring error was relied upon by the trial court and the issue was properly preserved.

Court of Appeals opinion reversed to the extent that it upheld the assessment of points under OV 12, trial court's judgment of sentence vacated, and case remanded to the trial court for resentencing on the basis of accurately scored offense variables.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Amanda Morris Smith*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Douglas W. Baker*) for defendant.

PER CURIAM. Defendant, Alonzo Carter, fired three shots through the door of an apartment he knew to be occupied. He was convicted by a jury of, among other things, assault with intent to do great bodily harm (AWIGBH).[1] At issue in this case is whether each separate pull of the trigger constitutes a separate "act" under Offense Variable (OV) 12 (contemporaneous felonious acts).[2] Because the evidence does not support the conclusion that the jury considered only one shot when deliberating over the elements of AWIGBH, we hold that it was inappropriate to assess defendant 10 points under OV 12. Further, because reducing defendant's OV score to rectify this error would reduce the applicable guidelines range, resentencing is required.[3]

[1] MCL 750.84.

[2] MCL 777.42.

[3] See *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

In January 2015, defendant lived in the same apartment building as Lawrence Sewell. A young woman and her infant child lived with Sewell as well. On January 11, 2015, defendant and Sewell were involved in a verbal altercation outside Sewell's apartment, but it did not escalate any further at that time. That evening, however, defendant returned to Sewell's apartment and attempted to lure Sewell to the door by impersonating a maintenance worker. Sewell looked through the door's peephole and saw defendant waiting outside wearing a ski mask and holding a firearm. Sewell did not allow defendant to enter, and defendant fired three shots through the apartment door at chest level. Two shots skipped off the apartment floor and through a window, while another punctured an air mattress on which the infant child slept. None of the apartment's occupants was shot.

Defendant was identified as the shooter and charged as a fourth-offense habitual offender with assault with intent to murder (AWIM),[4] AWIGBH,[5] felon in possession of a firearm (felon-in-possession),[6] intentional discharge of a firearm at a dwelling,[7] felonious assault,[8] and carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm) second offense.[9] A jury acquitted defendant of AWIM but convicted him of all other charges.

At sentencing, defense counsel did not make any objections or request corrections to the scoring of the sentencing guidelines. Accordingly, the trial court sen-

[4] MCL 750.83.
[5] MCL 750.84.
[6] MCL 750.224f.
[7] MCL 750.234b.
[8] MCL 750.82.
[9] MCL 750.227b.

tenced defendant to concurrent prison terms of 5 to 10 years for AWIGBH, 1 to 5 years for felon-in-possession, 1 to 10 years for intentional discharge of a firearm at a dwelling, and 1 to 4 years for felonious assault, all to be served consecutively to a two-year prison sentence for felony-firearm.[10]

Defendant filed a motion to remand in the Court of Appeals, objecting to the assessment of points under Prior Record Variable (PRV) 1 (prior high severity felony convictions),[11] OV 4 (psychological injury to the victim),[12] and OV 12. The motion was denied. In his brief on appeal, defendant continued to contest the trial court's scoring under these three sentencing variables. The prosecution conceded error with regard to the points assessed under OV 4 and also conceded that PRV 1 should have been scored at 50 points, rather than the 75 points assessed in the trial court. Nonetheless, the prosecution continued to defend the 10 points assessed under OV 12.

In an unpublished per curiam opinion, the Court of Appeals affirmed the scoring of OV 12, reasoning that "[e]ach time defendant pulled the trigger was a separate act, and only one [act] was needed to convict him. Thus, the other two acts of pulling the trigger would be contemporaneous felonious criminal act[s] . . . ."[13] Because removal of the points that were incorrectly assessed under OV 4 and PRV 1 did not affect the applicable guidelines range, the panel did not order

[10] Shortly after sentencing, the parties stipulated on the record that defendant had been improperly sentenced on the felony-firearm conviction. The trial court resentenced defendant on that count to the mandatory consecutive prison term of five years for a second offense.

[11] MCL 777.51.

[12] MCL 777.34.

[13] *People v Carter*, unpublished per curiam opinion of the Court of Appeals, issued June 27, 2017 (Docket No. 331142), p 3.

resentencing.[14] Defendant now seeks leave to appeal in this Court, once again challenging the 10-point assessment under OV 12 and seeking resentencing. We granted oral argument to determine whether to grant the application or take other action.[15]

A trial court's factual determinations at sentencing are reviewed for clear error and need only be supported by a preponderance of the evidence.[16] Whether the facts, as found, are adequate to warrant the assessment of points under the pertinent OVs and PRVs is a question of statutory interpretation, which this Court reviews de novo.[17]

OV 12 is governed by MCL 777.42, which states that it is appropriate to assess an offender 10 points when "[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed."[18] In assessing any points under this particular variable, the pertinent portion of MCL 777.42 provides:

> (2) All of the following apply to scoring offense variable 12:
>
> (a) A felonious criminal act is contemporaneous if both of the following circumstances exist:
>
> (*i*) The *act* occurred within 24 hours of the *sentencing offense*.
>
> (*ii*) The act has not and will not result in a separate conviction.[19]

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[14] *Id*. Defendant moved for reconsideration, and the Court of Appeals denied defendant's motion in August 2017. *People v Carter*, unpublished order of the Court of Appeals, entered August 15, 2017 (Docket No. 331142).

[15] *People v Carter*, 501 Mich 1089 (2018). See also MCR 7.305(H)(1).

[16] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

[17] *Id*.

[18] MCL 777.42(1)(b).

[19] MCL 777.42(2)(a) (emphasis added).

The prosecution would have us conclude that each gunshot constituted a separate "act" and that the "sentencing offense"[20] was premised exclusively on a single shot. Because the Legislature used the word "act" in one portion of MCL 777.42(2)(a)(*i*) and the phrase "sentencing offense" later in the same sentence, we must presume it intended to draw a distinction between the two.[21] Nevertheless, the Legislature does not define "sentencing offense" or "act" for purposes of assessing points under this or *any* offense variable.

The parties focus much of their argument on whether each separate discharge of defendant's firearm could have constituted a different assaultive offense; but as the Court of Appeals held in *People v Light*, a determination of whether an offender has engaged in multiple "acts" for purposes of OV 12 does not depend on whether he or she could have been charged with other offenses for the same conduct.[22] What matters, instead, is whether the "sentencing offense" can be separated from other distinct "acts."[23] This Court has previously defined "sentencing offense" in the context of OVs as "the crime of which the defendant has been convicted and for which he or she is being sentenced."[24] Thus, the "sentencing offense" which primarily informs our decision is AWIGBH, for which defendant received a controlling term of 5 to 10 years' imprisonment. We have therefore examined the record to determine whether factual support for defen-

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[20] See *id*.

[21] See *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009) ("When the Legislature uses different words, the words are generally intended to connote different meanings.").

[22] *People v Light*, 290 Mich App 717, 725-726; 803 NW2d 720 (2010).

[23] See *id*.; MCL 777.42(2)(a)(*i*).

[24] *People v McGraw*, 484 Mich 120, 122 n 3; 771 NW2d 655 (2009).

dant's AWIGBH conviction was established on the basis of all three gunshots or only one.

The most revealing portion of the record pertains to the prosecution's closing argument:

> So, for the first count of assault with intent to murder, I have to show you, first, that the defendant tried to physically injure another person.
>
> I submit to you that that is obvious. *If you shoot three times*, through a door, chest level, right after the latch on the door has clicked, you are trying to physically injure another person.
>
> Second, that when the defendant committed the assault, he had the ability to cause an injury, or at least believed that he had the ability to cause an injury.
>
> *Three shots* to the chest is the ability to cause an injury to somebody. There is no doubt but that shooting a gun at somebody is going to injure them.
>
> * * *
>
> I submit to you that it's obvious, his intent, by waiting until someone is at the door, and hearing the latch click, and then *shooting three times*, chest level, through that door; that he was trying to kill the person that earlier in the day he told to stay out of his . . . business.
>
> Now, the second count, it's a lesser. It's called assault with intent to do great bodily harm less than murder. You can consider this if for some reason you don't think his intent was murder. It's basically the same charge, other than you think he intended to commit great bodily harm less than murder instead of murder.
>
> But, again, as I submitted to you, *three shots*, chest level, through a door. You're trying to kill somebody. This count two is something you can consider, instead, if you think his intent was to commit great bodily harm less than murder.[25]

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[25] Emphasis added.

Given that, in this case, the prosecution relied on all three gunshots as evidence of defendant's intent to commit murder or inflict great bodily harm, a finding that two of the gunshots were not part of the sentencing offense cannot be supported by the evidence.[26] Consequently, it was inappropriate for the Court of Appeals to distinguish two gunshots from the conduct constituting the "sentencing offense."[27]

The prosecution insists that the 10-point assessment under OV 12 remains appropriate because defendant could have been charged with separate offenses relating to the young woman or her infant child. It might be true that defendant could have been charged with assaultive offenses relating to the woman and her child,[28] but this does not resolve the relevant inquiry. As previously stated, the prosecution relied on all three gunshots to establish the intent element of the "sentencing offense." Those same three gunshots cannot then be used to establish separate "acts" that occurred within 24 hours of the "sentencing offense" under MCL 777.42(2)(a)(*i*).[29]

We limit our holding to these facts because the prosecution relied on all three gunshots to establish an element of the "sentencing offense." By no means do we

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[26] See *Hardy*, 494 Mich at 438.

[27] See *id*.

[28] Cf. *People v Raher*, 92 Mich 165, 166; 52 NW 625 (1892) ("It has been held that where a prisoner fired a gun in the direction of a crowd he was guilty of assault upon each.").

[29] To hold otherwise would render Subdivision (a)(*i*) a nullity as applied in this case, and we will not interpret a statute in such a manner as to treat any word as nugatory or mere surplusage. See *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014). Further, because the prosecution failed to demonstrate any additional "acts" that occurred within 24 hours of the "sentencing offense," there is no need to consider whether such "acts" have or will result in a separate conviction as required under MCL 777.42(2)(a)(*ii*).

suggest that there can be no circumstances under which multiple gunshots may constitute separate "acts" that are distinguishable from the "sentencing offense." But we are not confronted with such facts in this case.

Reducing defendant's variable score to account for the improper assessment of points under OV 12 alters the recommended minimum guidelines range.[30] Although defendant's sentence falls within the proper guidelines range, defendant is entitled to resentencing under accurately scored offense variables because the scoring error was relied upon by the trial court and the issue was properly preserved.[31] We therefore reverse the Court of Appeals' unpublished per curiam opinion to the extent that it upheld the assessment of points under OV 12, vacate the trial court's judgment of sentence, and remand the case to the trial court for resentencing on the basis of accurately scored offense variables.

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred.

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[30] AWIGBH is a Class D offense. See MCL 777.16d. According to his presentence investigation report, defendant was initially assessed 127 points under the pertinent PRVs and 60 points under the pertinent OVs. After the Court of Appeals held that defendant should have been assessed 25 fewer points under PRV 1 and zero points under OV 4, defendant's PRV and OV assessments sat at 102 and 50 points, respectively. Because defendant was convicted as a fourth-offense habitual offender, see MCL 769.12, his minimum sentence range under the guidelines was 38 to 152 months' imprisonment. See MCL 777.65. With the reduction of points that would result from an order consistent with this analysis, defendant's recommended minimum sentence range would be 34 to 134 months' imprisonment. See *id*.

[31] *Francisco*, 474 Mich at 92 ("Because defendant's sentence here is based upon an inaccurate calculation of the guidelines range and is, therefore, inconsistent with the law, defendant is entitled to be resentenced."). Notably, as stated earlier, defendant preserved his challenge to the assessment of points under OV 12 by filing a proper motion for remand. See *id*. at 88-91.

HEGADORN v DEPARTMENT OF HUMAN SERVICES DIRECTOR
TRIM v DEPARTMENT OF HUMAN SERVICES DIRECTOR
TINDLE v DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket Nos. 156132, 156133, and 156134. Argued October 9, 2018 (Calendar No. 3). Decided May 9, 2019.

Plaintiffs Mary A. Hegadorn (Docket No. 156132), Dorothy Lollar (Docket No. 156133), and Roselyn Ford (Docket No. 156134) were elderly women receiving long-term care in nursing homes. In each case, the plaintiff, an "institutionalized spouse," began receiving long-term care at a nursing home at her own expense. After their institutionalization, each plaintiff's husband, a "community spouse," created an irrevocable trust that was solely for his own benefit (an SBO trust). The couples then transferred a majority of their individual and marital property to each SBO trust or its trustee, giving up any claim of title to that property. A short time after each SBO trust was formed, each institutionalized spouse applied for Medicaid benefits. The Department of Health and Human Services and its director (collectively, the department) determined that the entire value of the principal of each SBO trust was a countable asset for the purpose of determining each institutionalized spouse's eligibility for Medicaid benefits and denied their applications because the value of the trust assets put their countable resources above the $2,000 threshold. Plaintiffs contested the department's determinations regarding their respective applications, and in each case, an administrative law judge (ALJ) affirmed the department's determination. Hegadorn and Lollar separately appealed the ALJ decisions in the Livingston Circuit Court, and Ford appealed in the Washtenaw Circuit Court. With respect to Hegadorn and Lollar, the court, Michael P. Hatty, J., reversed the ALJ's decisions, as did the court, Timothy P. Connors, J., with respect to Ford. Plaintiffs all died during the appeals process, and their personal representatives—Ralph D. Hegadorn, Deborah D. Trim, and Denise Tindle—have been substituted as parties for Hegadorn, Lollar, and Ford, respectively. The Court of Appeals granted the department's applications for leave to appeal in each case, and the Court ordered the cases consolidated. In a published per curiam opinion, the Court of Appeals, M. J. KELLY, P.J., and STEPHENS and O'BRIEN, JJ., reversed, holding that assets

placed by an institutionalized individual's spouse into an SBO trust are countable assets for determining whether an individual is eligible for Medicaid benefits. 320 Mich App 549 (2017). The Supreme Court granted plaintiffs' application for leave to appeal. 501 Mich 984 (2018).

In a unanimous opinion by Justice BERNSTEIN, the Supreme Court *held*:

Marital assets placed in an irrevocable trust for the sole benefit of a community spouse are not automatically considered countable assets for the purpose of an institutionalized spouse's initial eligibility determination for Medicaid long-term-care benefits. Rather, such assets become countable only if circumstances exist under which the trust could make a payment to or for the benefit of the institutionalized spouse. Accordingly, the Court of Appeals judgment and the ALJ's final hearing decisions in each case were vacated.

1. The department administers Michigan's Medicaid program in accordance with policies contained in several publications, including the *Bridges Eligibility Manual*, the Social Security Administration's *Program Operations Manual System*, and the *State Medicaid Manual*. A person who falls in the optional medically needy category, like each plaintiff here, cannot qualify for Medicaid benefits if his or her countable assets and income exceed $2,000 during the period in which he or she applies for benefits. The extent to which the principal of a trust is a countable asset depends on the terms of the trust and whether any of the principal consists of countable assets or countable income. With respect to irrevocable trusts, the department must count as the person's countable asset the value of the countable assets in the trust principal if there is any condition under which the principal could be paid to or on behalf of the person from an irrevocable trust. Additional rules applicable only to institutionalized spouses are described in the Medicare Catastrophic Coverage Act (MCCA), codified at 42 USC 1396r-5.

2. When determining an institutionalized spouse's eligibility for Medicaid benefits, a computation of the couple's total joint resources is taken as of the beginning of the first continuous period of institutionalization in order to determine the amount of the "spousal share" allocated to the community spouse. The couple's resources are divided into those that are countable and those that are exempt. One-half of the total value of their countable resources "to the extent either the institutionalized spouse or the community spouse has an ownership interest" is considered a spousal share. The spousal share allocated to the

community spouse qualifies as the community spouse resource allowance (CSRA), which is the monetary value of assets that may be retained by or transferred to the community spouse without those resources being counted against the institutionalized spouse for his or her initial eligibility determination. Once the amount of the CSRA is determined, a second calculation is required to determine the resources available to the institutionalized spouse for the purpose of determining the institutionalized spouse's initial Medicaid eligibility. This calculation is based on the resources available to the institutionalized spouse on the day that the institutionalized spouse submits his or her application for Medicaid benefits. In determining the resources of an institutionalized spouse at the time of application for benefits, 42 USC 1396r-5(c) provides that all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse to the extent that they exceed the CSRA. After the month in which an institutionalized spouse is determined to be eligible for benefits, no resources of the community spouse shall be deemed available to the institutionalized spouse. While the MCCA contains provisions governing the treatment of income paid from a trust, its general resource allocation provisions are silent with regard to the treatment of assets or resources held by a trust. The MCCA also does not provide a definition for the term "resources," but the term does not include those things excluded by 42 USC 1382b(a) or (d). Assuming without deciding that the principal of an irrevocable trust constitutes a resource as that term is used in 42 USC 1396r-5, such a resource is not "held by" the institutionalized or community spouse. The property that makes up the principal of a trust is not owned by or otherwise directly available to the beneficiary. Instead, the trustee holds title to the property that constitutes the principal of a trust and holds it in trust for the beneficiary. The trust beneficiary, on the other hand, holds a right to enforce the performance of the trust in equity. Unless the beneficiary is also a trustee, the beneficiary does not own the property forming the principal of the irrevocable trust.

3. The first two paragraphs of the Medicaid trust rules contained in 42 USC 1396p(d) describe to whom the rules apply and how to determine whether that person created a trust. Under 42 USC 1396p(d)(1), for purposes of determining an individual's eligibility for, or amount of, benefits under a state plan, subject to 42 USC 1396p(d)(4), the rules specified in 42 USC 1396p(d)(3) apply to a trust established by such individual. Because Medicaid benefits are granted only to those who apply for them and who also meet the eligibility requirements, if an eligibility determina-

tion is being made, then the "individual" referred to in 42 USC 1396p(d)(1) must be a person applying for Medicaid benefits or a person who has been approved for a yet-to-be-determined amount of benefits. Applied to the context of this appeal, the individual referred to is the institutionalized spouse, who is the Medicaid applicant. The plain language of 42 USC 1396p(d)(1) thus provides that, to determine an institutionalized spouse's eligibility for Medicaid benefits, the rules outlined in 42 USC 1396p(d)(3) govern trusts established by the institutionalized spouse. Under 42 USC 1396p(d)(2), an individual has established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will: the individual, the individual's spouse, a person with legal authority to act in place of or on behalf of the individual or the individual's spouse, or a person acting at the direction or upon the request of the individual or the individual's spouse. Therefore, when a community spouse creates a trust, other than by will, using assets of his or her institutionalized spouse, that action is legally attributed to the institutionalized spouse for the purposes of the institutionalized spouse's Medicaid eligibility determination.

4. To determine whether assets held by an irrevocable trust are available to the applicant and thus countable for his or her initial eligibility determination, the "any-circumstances rule" set forth in 42 USC 1396p(d)(3)(B) applies. This rule states, in part, that if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual. Correctly applying the any-circumstances rule requires understanding to whom "the individual" refers. The use of the definite article "the" preceding "individual" suggests that the term refers to a single person, as opposed to an open class of all people. Additionally, 42 USC 1396p(d)(1) uses "an individual" to refer to a person applying for Medicaid benefits or a person who qualifies for an amount of benefits that is yet to be determined. This provision then states that 42 USC 1396p(d)(3) applies to a trust established by that applicant or recipient. Thus, while "an individual" in 42 USC 1396p(d)(1) can be read as referring to a potential class of persons, when "such individual" establishes a trust, that class is reduced to a single person for the purposes of 42 USC 1396p(d)(3). 42 USC 1396p(d)(2) also refers to "an individual," and it contrasts that term with "the individual's spouse." Reading these provisions together, it follows that when Paragraph (3) refers to "the individual," it is referring to the same individual whose eligibility for,

or amount of, benefits is being determined and who has established a trust under Paragraph (2): the applicant for or recipient of Medicaid benefits. When considering the eligibility of an institutionalized spouse for Medicaid benefits, "the individual" must be read as referring to the institutionalized spouse to the exclusion of the community spouse, who, by definition, is not applying for or receiving Medicaid benefits. Because the *Bridges Eligibility Manual* incorporates the any-circumstances rule into Michigan's Medicaid policies, this same restriction applies, despite the manual's use of the term "person" in place of "individual." The any-circumstances rule, therefore, makes assets held by an irrevocable trust available to an institutionalized spouse if there are any circumstances, whether likely or hypothetical, under which the trust could make a payment to or for the benefit of the institutionalized spouse. If an irrevocable trust can make payments only to the community spouse, then those payments will satisfy the any-circumstances rule only if there is evidence that the payments could be for the benefit of the institutionalized spouse. If application of 42 USC 1396p(d)(3)(B) makes assets held by an irrevocable trust available to an institutionalized spouse, then the value of such assets is countable for the purposes of 42 USC 1396r-5(c).

5. The language of the trust documents themselves determines whether the SBO trusts at issue allow for a payment to be made "to or for the benefit of" the institutionalized spouses. The SBO trusts at issue are irrevocable trusts, meaning the principal of each trust is not automatically rendered available to the institutionalized spouse under 42 USC 1396p(d)(3)(A) and (B). Furthermore, the property and income that make up the principal of the SBO trusts at issue are not held by the institutionalized spouses or the community spouses. Rather, title to the property that is now the principal of each trust was transferred to the trust or trustee, and the money that forms part of the principal was moved into bank accounts controlled by the trustee. There was no suggestion that the community spouses retained possession of the tangible property that forms the principals of the trusts. Therefore, the principals of the SBO trusts are not automatically considered resources available to any of the spouses under 42 USC 1396r-5(c). Accordingly, the principal of each SBO trust can be considered a resource available to the institutionalized spouse, and thus a countable asset, only if made so by operation of the any-circumstances rule in 42 USC 1396p(d)(3)(B). Each of the SBO trusts at issue instructs the trustee to deplete the entirety of the principal during the community spouse's lifetime. Because the community

spouses are not themselves applying for or receiving Medicaid benefits, they are not "the individual" referred to in 42 USC 1396p(d)(3)(B). Thus, the Court of Appeals erred by holding that the possibility of a distribution from each SBO trust to each community spouse automatically made the assets held by each SBO trust countable assets for the purposes of the respective institutionalized spouses' initial eligibility determination. Accordingly, the Court of Appeals judgment was reversed, the final administrative hearing decision in each case was vacated, and each case was remanded to the appropriate administrative tribunal for the proper application of the any-circumstances test. If the ALJs determine that circumstances exist under which payments from the trusts could be made to or for the benefit of the institutionalized spouse, then the ALJs should explain this rationale and affirm the department's decision. However, if no such circumstances exist, the ALJs should reverse the department's decisions and order that the Medicaid applications be approved.

Court of Appeals judgment reversed; tribunal decisions vacated; cases remanded to the appropriate tribunals for further proceedings.

Chief Justice MCCORMACK, concurring, agreed that property held in these SBO trusts was not countable toward Medicaid's resource limit because "the individual" in 42 USC 1396p(d)(3)(B) refers to the Medicaid applicant. She wrote separately to explain that, although the issue was not presented in these cases, she believed the plaintiffs' transfer of assets into the trusts triggered Medicaid's divestment rules, thus undermining plaintiffs' overall planning strategy by disqualifying them from receiving benefits despite having satisfied Medicaid's threshold resource test. She stated that the majority opinion should not be interpreted as permitting a married Medicaid applicant to shelter and preserve any amount of wealth without restriction and then immediately receive financial assistance as if the applicant did not have that amount.

Justice CAVANAGH did not participate in the disposition of this case because the Court considered it before she assumed office.

SOCIAL SERVICES — MEDICAID — LONG-TERM-CARE BENEFITS — ELIGIBILITY DETERMINATIONS — COUNTABLE ASSETS — "SOLE BENEFIT OF" IRREVOCABLE TRUSTS — ANY-CIRCUMSTANCES RULE.

Marital assets placed in an irrevocable trust for the sole benefit of a community spouse are not automatically considered countable assets for the purpose of determining an institutionalized

spouse's eligibility for Medicaid long-term-care benefits; such assets become countable only if any circumstances exist under which the trust could make a payment to or for the benefit of the institutionalized spouse (42 USC 1396p(d); 42 USC 1396r-5).

Steward & Sheridan, PLC (by *James B. Steward* and *Angela M. Hentkowski*) for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Geraldine A. Brown* and *Chantal B. Fennessey*, Assistant Attorneys General, for defendants.

Amici Curiae:

James Schuster for the Elder Law and Disability Rights Section of the State Bar of Michigan and the Michigan Chapter of the National Academy of Elder Law Attorneys.

Tuesley Hall Konopa LLP (by *Jennifer L. VanderVeen*) and *Landsman Law Group* (by *Ron M. Landsman*) for the National Academy of Elder Law Attorneys.

BERNSTEIN, J. In these consolidated cases, the individual plaintiffs[1] were elderly women receiving long-term care in nursing homes. In each case, the plaintiff, an "institutionalized spouse,"[2] began receiving long-term care at a nursing home at her own expense. One

[1] The original plaintiffs, Mary Hegadorn, Dorothy Lollar, and Roselyn Ford, are now deceased, and the personal representatives of their respective estates have continued this action on their behalf. For ease of reference, this opinion will use "plaintiffs" to refer collectively to the original plaintiffs who initiated these proceedings.

[2] An "institutionalized spouse" is a person who is in a "medical institution or nursing facility" or who is described in 42 USC 1396a(a)(10)(A)(ii)(VI), is likely to meet these requirements "for at least 30 consecutive days," and is married to a person who is not in such a facility. 42 USC 1396r-5(h)(1)(A) and (B).

to two months later, each plaintiff's husband, a "community spouse,"[3] created an irrevocable trust that was solely for his own benefit. Such a trust is commonly called a "solely for the benefit of," or "SBO," trust.[4] The couples then transferred a majority of their individual and marital property to each SBO trust or its trustee, giving up any claim of title to that property. Distributions or payments from each SBO trust were to be made on an actuarially sound basis and solely to or for the benefit of the community spouse. The actuarially sound distribution schedule required that each trustee distribute the income and resources held by the trust to each community spouse at a rate that would deplete the trust within the community spouse's expected lifetime. A short time after each SBO trust was formed, each institutionalized spouse applied for Medicaid benefits. The Department of Health and Human Services[5]

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[3] A "community spouse" is "the spouse of an institutionalized spouse." 42 USC 1396r-5(h)(2).

[4] The parties and the Court of Appeals often refer to the SBO trusts at issue as "Medicaid trusts." This is an accurate label under state regulations, although the label is not used in the federal Medicaid statutes. A Medicaid trust is any trust or trust-like instrument that meets the following five criteria: (1) "[T]he person whose resources were transferred to the trust is someone whose assets or income must be counted to determine [Medicaid] eligibility"; (2) the trust was established by the person, the person's spouse, or someone else acting in place of or at the direction of the person or the person's spouse; (3) "[t]he trust was established on or after August 11, 1993"; (4) the trust was not established by will; and (5) the trust is not a "special needs trust" or "pooled trust" as defined by state regulations. See Michigan Department of Human Services, *Bridges Eligibility Manual (BEM) 401*, BPB 2014-015 (July 1, 2014), pp 5-7. It is undisputed that the trusts at issue meet these criteria.

[5] The Department of Community Health was merged with the Department of Human Services in 2015 after the plaintiffs in Docket Nos. 156132 and 156133 filed their complaints. The combined agency is now the Department of Health and Human Services. Executive Order No. 2015-4. See *In re Rasmer Estate*, 501 Mich 18, 26 n 3; 903 NW2d 800 (2017).

and its director (collectively, the Department) determined that the entire value of the principal of each SBO trust was a countable asset for the purpose of determining each institutionalized spouse's eligibility for Medicaid benefits. Thus, the Department concluded that each institutionalized spouse did not show the requisite financial need because the value of the trust assets put their countable resources above the monetary threshold, and it denied each application.

In each case, the plaintiff unsuccessfully contested the Department's decision in an administrative appeal, but each decision was then reversed on appeal in the circuit court. On appeal in the Court of Appeals, all three cases were consolidated, and the Department's denial decisions were reinstated in a published opinion.

With the cases having been appealed in this Court, we conclude that the Court of Appeals erred in its interpretation of the controlling federal statutes, which caused the Court of Appeals to improperly reinstate the Department's denial decisions. As explained in this opinion, the fact that an irrevocable trust, which includes former assets of an institutionalized spouse, can make payments to a community spouse does not automatically render the assets held by the trust countable for the purpose of an institutionalized spouse's initial eligibility determination. See 42 USC 1396p(d)(3)(B); 42 USC 1396r-5(c)(2). Accordingly, we reverse the judgment of the Court of Appeals. Because the administrative hearing decision in each case suffered from the same faulty reasoning used by the Court of Appeals, this legal error may have caused the administrative law judges (ALJs) to forgo a more thorough review of the Medicaid applications at issue or to disregard other avenues of legal analysis. Therefore, rather than order that the Medicaid applications be approved at this time,

we vacate the hearing decision of the ALJ in each case and remand these cases to the appropriate administrative tribunal for any additional proceedings necessary to determine the validity of the Department's decision to deny plaintiffs' Medicaid applications.[6]

I. FACTS AND PROCEDURAL HISTORY

This appeal involves three cases that have been consolidated for the purpose of appellate review. In Docket No. 156132, Mary Ann Hegadorn (Mrs. Hegadorn) began receiving long-term care at the MediLodge Nursing Home in Howell, Michigan, on December 20, 2013. Approximately one month later, her husband, Ralph D. Hegadorn (Mr. Hegadorn), established the "Ralph D. Hegadorn Irrevocable Trust No. 1 (Sole Benefit Trust)" (Hegadorn Trust). Mr. Hegadorn is the beneficiary of the Hegadorn Trust, and neither he nor his wife is the trustee or successor trustee. Section 2.2 of the Hegadorn Trust states that the "Trustee shall distribute the Resources of the Trust at a rate that is calculated to use up all of the Resources during" Mr. Hegadorn's expected lifetime, and it includes a suggested distribution schedule that is based on the Department's policies. The Hegadorn Trust also lists another trust as a possible residual beneficiary, stating:

> At my death, if my Spouse is surviving, Trustee shall distribute the remaining trust property to the trustee of the Special Supplemental Care Trust for Mary Ann Hegadorn, created by my Will dated the same day as this

[6] The Court of Appeals also held that it was permissible for the Department to apply changes in its application of *BEM 401* and in its reading of the federal Medicaid statutes to applications filed before such changes occurred. We need not reach this issue, because we have determined that the Court of Appeals erred in its interpretation of the controlling Medicaid statutes.

> Agreement, as my Will may be amended from time to time. [Hegadorn Trust, § 3.3 (formatting altered).]

On April 24, 2014, Mrs. Hegadorn applied for Medicaid benefits. The Department subsequently denied Mrs. Hegadorn's application, determining that her countable assets, including the assets that were placed in the Hegadorn Trust, exceeded the applicable financial eligibility limit.

In Docket No. 156133, Dorothy Lollar (Mrs. Lollar) began receiving long-term care at the MediLodge Nursing Home in Howell, Michigan, on May 1, 2014. Approximately a month and a half later, Mrs. Lollar's husband, Dallas H. Lollar (Mr. Lollar), established the "Dallas H. Lollar Irrevocable Trust" (Lollar Trust), which provided that it was intended to "be a 'Solely for the Benefit of' trust." Mr. Lollar is the beneficiary of the Lollar Trust, and neither he nor his wife is the trustee or successor trustee. Section 2.2 of the Lollar Trust states that the Trustee "shall . . . pay or distribute" to Mr. Lollar, "or for [his] sole benefit, during [his] lifetime such part or all of the net income and principal" of the Trust "as Trustee determines is necessary to distribute the resources in [sic] an actuarially sound basis . . . ." The Lollar Trust also lists another trust as a possible residual beneficiary, stating that in the event of Mr. Lollar's death, he "give[s] all the rest, residue and remainder of this Sole Benefit Trust to the Dallas H. Lollar Revocable Trust Agreement U/A/D June 19, 2014, and administered according to the terms of that Agreement." Lollar Trust, § 3.2b (formatting altered). On July 21, 2014, Mrs. Lollar applied for Medicaid benefits. The Department subsequently denied Mrs. Lollar's application, determining that her countable assets, including the assets

that were placed in the Lollar Trust, exceeded the applicable financial eligibility limit.

In Docket No. 156134, Roselyn Ford (Mrs. Ford) began receiving long-term care at the Saline Evangelical Nursing Home in Saline, Michigan, on December 5, 2013. About a month later, Mrs. Ford's husband, Herbert W. Ford (Mr. Ford), established the "Herbert Ford Irrevocable Trust" (Ford Trust), which provided that it was intended to be "a 'solely for the benefit of' trust." Mr. Ford is the beneficiary of the Ford Trust, and neither he nor his wife is the trustee or successor trustee. The Ford Trust also provides that the "Trustee shall . . . pay or distribute to [Mr. Ford], or for [his] sole benefit, during his lifetime whatever part of the net income and principal (the Resources) of the Trust that Trustee determines is necessary to distribute the resources on an actuarially sound basis." Section 3.2 of the Ford Trust lists as possible residual beneficiaries separate trusts to be established by Mr. Ford's will for the benefit of his living children and the descendants of his deceased children. On January 30, 2014, Mrs. Ford applied for Medicaid benefits. The Department subsequently denied Mrs. Ford's application, determining that her countable assets, including the assets that were placed in the Ford Trust, exceeded the applicable financial eligibility limit.[7]

Each plaintiff timely requested an administrative hearing to contest the Department's decision. With respect to Mrs. Hegadorn's and Mrs. Lollar's cases, a consolidated hearing was held before ALJ Landis Y.

[7] We note that the Ford Trust and Lollar Trust also reserve to the community spouses a special testamentary power of appointment, which allows them to appoint, by will, items or funds held by the trust directly to their children or their children's descendants. This power does not allow for appointments to any other individuals or entities.

Lain, who affirmed the Department's decision. With respect to Mrs. Ford's case, a hearing was held before ALJ Alice C. Elkin, who similarly affirmed the Department's decision. Each ALJ agreed with the Department that *Bridges Eligibility Manual (BEM) 401* required the Department to count the assets held by each trust because the trust could make payments to the community spouse. The ALJs further concluded that this was consistent with the controlling federal statutes. The ALJs made no factual findings and rendered no conclusions of law regarding possible payments to the trusts that are listed as residual beneficiaries in the SBO trusts.

The plaintiff in each case appealed in the appropriate circuit court and, in each case, the circuit court reversed the ALJ's decision. The Department appealed each circuit court decision in the Court of Appeals, which consolidated the cases. In a published opinion, the panel reversed the circuit courts and reinstated the ALJs' decisions to deny benefits. Plaintiffs timely sought leave to appeal in this Court. We granted plaintiffs' application in an order entered March 7, 2018, stating:

> The parties shall include among the issues to be briefed whether: (1) the Court of Appeals clearly erred in holding that the trust assets of the plaintiffs' spouses and decedent Lollar's spouse are "countable assets" for purposes of Medicaid eligibility; and (2) the Department of Health and Human Services could base its decision on the retroactive application of a department policy adopted more than 45 days after the plaintiffs' applications were filed. [*Hegadorn v Dep't of Human Servs Dir*, 501 Mich 984 (2018).]

II. STANDARD OF REVIEW

Resolution of this appeal turns on whether the federal Medicaid statutes, which govern certain aspects of the Department's Medicaid policies, allow the

Department to count the assets held in a community spouse's SBO trust in determining an institutionalized spouse's eligibility for Medicaid. Final agency decisions are subject to judicial review pursuant to the Michigan Constitution, see Const 1963, art 6, § 28, and the Administrative Procedures Act (APA), MCL 24.201 *et seq*. The Michigan Constitution provides:

> All final decisions . . . of any administrative officer or agency . . . which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions . . . are authorized by law . . . . [Const 1963, art 6, § 28.]

The APA provides that, unless a different scope of review is established by law,

> the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
>
> * * *
>
> (f) Affected by other substantial and material error of law. [MCL 24.306(1).]

The APA further instructs that "[t]he court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings." MCL 24.306(2).

An administrative agency's interpretation of a statute that it is obligated to execute is entitled to "respectful consideration," but it "cannot conflict with the plain meaning of the statute." *In re Rovas Complaint Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). We

review issues of statutory interpretation de novo. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). "The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute." *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018). When interpreting federal statutes, we strive to "give effect to the will of Congress[.]" *Walters*, 481 Mich at 381 (quotation marks and citations omitted.)

This case also requires us to construe language in trust documents. The proper construction of a trust, like the construction of a will, is a question of law subject to de novo review. See *In re Raymond Estate*, 483 Mich 48, 53; 764 NW2d 1 (2009). Our goal in interpreting trust language is to determine and give effect to the trustor's intent. *Id*. at 52. We begin by examining the language of the trust itself, and, if there is no ambiguity, we interpret it according to its plain and ordinary meaning. *Id*.; *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985).

III. ANALYSIS

A. OVERVIEW OF MEDICAID

The Medicaid program is governed by a complex web of interlocking statutes, as well as regulations and interpretive documents published by state and federal agencies. The program was created by Title XIX of the Social Security Act of 1965, PL 89-97; 79 Stat 343, codified at 42 USC 1396 *et seq*. Medicaid is generally a need-based assistance program for medical care that is funded and administered jointly by the federal government and individual states. *Ketchum Estate v Dep't of*

Health & Human Servs, 314 Mich App 485, 488; 887 NW2d 226 (2016). At the federal level, the program is administered by the Secretary of Health and Human Services through the Centers for Medicare & Medicaid Services (CMS). The *State Medicaid Manual* is published by CMS to help guide states in their administration of the program, including how to determine an applicant's eligibility for benefits. See *Ark Dep't of Health & Human Servs v Ahlborn*, 547 US 268, 275; 126 S Ct 1752; 164 L Ed 2d 459 (2006). " 'Each participating State develops a plan containing reasonable standards . . . for determining eligibility for and the extent of medical assistance' within boundaries set by the Medicaid statute and Secretary of Health and Human Services." *Wis Dep't of Health & Family Servs v Blumer*, 534 US 473, 479; 122 S Ct 962; 151 L Ed 2d 935 (2002), quoting *Schweiker v Gray Panthers*, 453 US 34, 36-37; 101 S Ct 2633; 69 L Ed 2d 460 (1981). "In formulating those standards, States must 'provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, *available* to the applicant.' " *Blumer*, 534 US at 479, quoting 42 USC 1396a(a)(17)(B).

Medicaid benefits are provided automatically for the "categorically needy," meaning persons who receive welfare payments through Aid to Families with Dependent Children (AFDC), 42 USC 601 *et seq*., or Supplemental Security Income (SSI), 42 USC 1382 *et seq*.[8] See

[8] By completing a "1634 agreement," a state may request that the Social Security Administration (SSA) make certain Medicaid eligibility determinations when making SSI eligibility determinations and agree to provide Medicaid benefits to those individuals whom the SSA deems eligible. Social Security Administration, *Program Operations Manual System* (SSA *POMS*), SI 01730.010 (February 6, 2013), available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501730010> (accessed May 2, 2019) [https://perma.cc/23YU-EYDR]. In states that

42 USC 1396a(a)(10)(A); Social Security Administration, *Program Operations Manual System* (SSA *POMS*), SI 01715.020 (August 2, 2016), available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501715020> (accessed May 2, 2019) [https://perma.cc/E6Q9-WSMB]. Congress has also enacted an optional program, in which states may elect to participate, for those who are deemed "medically needy." *Ark Dep't of Human Servs v Schroder*, 353 Ark 885, 890; 122 SW3d 10 (2003); 42 USC 1396a(a)(10)(A)(ii). Although medically needy individuals meet the nonfinancial requirements under either the AFDC or the SSI programs, they become eligible for Medicaid benefits only when their incomes and assets are reduced below certain established levels. See 42 USC 1396a(a)(10)(C); 42 CFR 435.301(b)(2) and (3) (2018); 42 CFR 435.320 (2018). Michigan has elected to include this optional coverage for the medically needy in its state Medicaid plan. Therefore, Michigan must comply with the requirements imposed by the federal Medicaid statutes. See *In re Rasmer Estate*, 501 Mich 18, 25; 903 NW2d 800 (2017); 42 USC 1396a. Plaintiffs here fall within the medically needy category for those over the age of 65. Therefore, to be eligible for Medicaid benefits, they were required to reduce their countable incomes and assets to or below $2,000. See *Mackey v Dep't of Human Servs*, 289 Mich App 688, 698; 808 NW2d 484 (2010); *BEM 400* (July 1, 2014), p 7; *BEM 402* (April 1, 2014), p 4.

As the United States Supreme Court has noted, "[b]ecause spouses typically possess assets and income jointly and bear financial responsibility for each other, Medicaid eligibility determinations for married appli-

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execute a 1634 agreement, like Michigan, an application for SSI benefits is also an application for Medicaid benefits. SSA *POMS*, SI 01730.005 (February 6, 2013), available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/050173 0005> (accessed May 2, 2019) [https://perma.cc/2L5F-6NWX].

cants have resisted simple solutions." *Blumer*, 534 US at 479. Prior to 1988, to become eligible for Medicaid benefits, a married individual who was admitted to a nursing home was required to "spend down" all the assets jointly held with his or her spouse who remained in the marital home. See HR Rep No 100-105(II), at 59, 65-67 (2d Sess 1988), as reprinted in 1988 USCCAN 857, 881, 888-890. That changed with the enactment of the Medicare Catastrophic Coverage Act of 1988 (MCCA), codified at 42 USC 1396r-5.[9] As the Supreme Court has recently explained, the MCCA was enacted "to protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance," which is why "Congress installed a set of intricate and interlocking requirements with which States must comply in allocating a couple's income and resources." *Blumer*, 534 US at 480.

Since the enactment of the MCCA, Congress has made numerous additional amendments of the Medicaid statutes to adapt the program to changing economic realities while striving to prevent abuse of the program. Many of these adjustments concern the use and evaluation of estate planning tools like trusts and annuities. The Consolidated Omnibus Budget Reconciliation Act of 1985, PL 99-272; 100 Stat 82, formerly codified at 42 USC 1396a(k), instructed states to treat as countable assets the maximum amount of a trust's principal a trustee could pay to a Medicaid applicant if the trustee were to exercise his or her discretionary authority, whether or not that discretion was actually exercised. See 1 Kove & Kosakow, Irrevocable Trusts

[9] Congress later repealed most of the MCCA through the Medicare Catastrophic Coverage Repeal Act of 1989, PL 101-234; 103 Stat 1979, but the spousal-impoverishment-prevention provisions contained in 42 USC 1396r-5 were retained.

(4th ed, October 2018 update), § 27:9. The Omnibus Budget Reconciliation Act of 1993 (OBRA 93), PL 103-66; 107 Stat 312, repealed 42 USC 1396a(k) and replaced it with the current Medicaid trust rules. See 42 USC 1396p(d); 1 Irrevocable Trusts, § 27:9.[10] States that choose to participate in the Medicaid program are required to "comply with the provisions of section 1396p of [Title XIX] with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, [sic] *and treatment of certain trusts*[.]" 42 USC 1396a(18) (emphasis added). As our review of these Medicaid statutes demonstrates, Congress has been particularly active in its efforts to prevent spousal pauperization while at the same time limiting the ability of wealthier individuals to shelter income and assets using estate planning tools.

B. TREATMENT OF TRUST RESOURCES FOR AN INSTITUTIONALIZED SPOUSE'S INITIAL ELIGIBILITY DETERMINATION

The main issue in this appeal is whether assets making up the principal of an irrevocable SBO trust are countable assets for the purpose of determining an institutionalized spouse's initial eligibility for Medicaid. In Michigan, the Department administers the state Medicaid program. The Department's policies are contained in several publications, including the *BEM*, the SSA *POMS*, and the *State Medicaid Manual*.[11] A

[10] There are also provisions, which are not at issue here, that subject an applicant to penalties for nonexempt transfers of resources during the five-year look-back period. See 42 USC 1396p(c)(1) through (5). Additional rules governing the evaluation of annuities were added by the Deficit Reduction Act of 2005, PL 109-171; 120 Stat 4, and codified at 42 USC 1396p(c)(1)(F) and (G), but they also are not at issue here, and their enactment did not modify the Medicaid trust rules codified at 42 USC 1396p(d).

[11] The *State Medicaid Manual* is published by the CMS to help guide states in administering the Medicaid program. The manual is not a

person who falls in the optional medically needy category, like each plaintiff here, cannot qualify for Medicaid benefits if his or her *countable assets* and income exceed $2,000 during the period in which he or she applies for benefits. See *Mackey*, 289 Mich App at 698; *BEM 400* at 7; *BEM 402* at 4. According to *BEM 401*, "[h]ow much of the principal of a trust is a countable asset depends on" "[t]he terms of the trust" and "[w]hether any of the principal consists of countable assets or countable income." *BEM 401* (July 1, 2014), p 10. With respect to irrevocable trusts, such as those at issue here, *BEM 401* instructs the Department to "[c]ount as the person's countable asset the value of the countable assets in the trust principal if there is any condition under which the principal could be paid to or on behalf of the person from an irrevocable trust." *Id.* at 11. The legal authority for *BEM 401* derives from two parts of the federal Medicaid statutes: 42 USC 1396a and 42 USC 1396p. See *BEM 401* at 17-18. However, additional rules applicable only to institutionalized spouses are described in 42 USC 1396r-5. These additional rules serve as a starting point for evaluating an institutionalized spouse's eligibility for Medicaid benefits.

1. 42 USC 1396r-5

When determining an institutionalized spouse's eligibility for Medicaid benefits, a computation of the couple's total joint resources is taken "as of the beginning of the first continuous period of institutionaliza-

product of formal rulemaking and does not have the force of law. *Hobbs ex rel Hobbs v Zenderman*, 579 F3d 1171, 1186 n 10 (CA 10, 2009). However, federal courts generally consider the manual to be strong persuasive authority to the extent that it is consistent with the purpose and text of federal statutes. *Id.*; *Hughes v McCarthy*, 734 F3d 473, 478 (CA 6, 2013).

tion," which may or may not be the same month in which one applies for benefits. 42 USC 1396r-5(c)(1)(A). The stated purpose of this first computation is to determine the amount of the "spousal share" allocated to the community spouse. 42 USC 1396r-5(c)(1)(A)(ii). The couple's resources are divided into those that are countable and those that are exempt.[12] One-half of the total value of their countable resources "to the extent either the institutionalized spouse or the community spouse has an ownership interest" is considered a spousal share. *Id*.

"The spousal share allocated to the community spouse qualifies as the [community spouse resource allowance or] CSRA, subject to a ceiling . . . indexed for inflation" by Congress. *Blumer*, 534 US at 482. The CSRA is the monetary value of assets that may be retained by or transferred to the community spouse without those resources being counted against the institutionalized spouse for his or her initial eligibility determination. See 42 USC 1396r-5(c)(2)(B) and (f); *Blumer*, 534 US at 482-483. Available resources in excess of the CSRA will generally disqualify an institutionalized spouse from receiving Medicaid benefits unless they are spent down prior to filing an application. 42 USC 1396r-5(c)(2); *Blumer*, 534 US at 482-483.

Once the amount of the CSRA is determined, a second calculation is required to determine the resources available to the institutionalized spouse for the purpose of determining the institutionalized spouse's initial Medicaid eligibility. 42 USC 1396r-5(c)(2). This calculation is

[12] While 42 USC 1396r-5 does not use the terms "countable" and "exempt," it provides that the term "resources" does not include those things excluded by 42 USC 1382b(a) or (d). See 42 USC 1396r-5(c)(5). Items excluded under those sections include the couple's home, 42 USC 1382b(a)(1); household goods and personal effects, 42 USC 1382b(a)(2)(A); and funds set aside for burial expenses, 42 USC 1382b(d).

based on the resources available to the institutionalized spouse on the day that the institutionalized spouse submits his or her application for Medicaid benefits. "In determining the resources of an institutionalized spouse at the time of application for benefits . . . , *all the resources held by* either the institutionalized spouse, community spouse, or both, shall be considered to be *available to* the institutionalized spouse" to the extent that they exceed the CSRA. 42 USC 1396r-5(c)(2)(A) and (B) (emphasis added). "[A]fter the month in which an institutionalized spouse is determined to be eligible for benefits . . . , no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 USC 1396r-5(c)(4). While the MCCA contains provisions governing the treatment of income paid from a trust, see 42 USC 1396r-5(b)(2)(B),[13] its general resource allocation provisions are silent with regard to the treatment of assets or resources held by a trust. The MCCA also does not provide a definition for the term "resources," but the term does not include those things excluded by 42 USC 1382b(a) or (d). See 42 USC 1396r-5(c)(5).

We are asked to consider whether the principal of an irrevocable trust, created using assets of both spouses but which may distribute payments only to or for the benefit of the community spouse, is a countable asset for the purpose of the institutionalized spouse's initial eligibility determination. Stated differently, is

[13] Any income payable solely to a community spouse from a trust is considered to be income available only to that community spouse. 42 USC 1396r-5(b)(2)(B)(ii) (stating that if income is paid solely to the institutionalized spouse or the community spouse, "the income shall be considered available only to that respective spouse"). Generally, the MCCA preserves a community spouse's income for that spouse so as to avoid affecting the institutionalized spouse's eligibility for Medicaid. See *Blumer*, 534 US at 480-481.

the principal of the irrevocable trust a "resource[] held by either the institutionalized spouse, community spouse, or both," such that it is considered "available to the institutionalized spouse"? 42 USC 1396r-5(c)(2)(A).

Assuming without deciding that the principal of an irrevocable trust constitutes a resource as that term is used in 42 USC 1396r-5, such a resource is not "held by" the institutionalized or community spouse.[14] The property that makes up the principal of a trust is not owned by or otherwise directly available to the beneficiary. Instead, the *trustee* holds title to the property that constitutes the principal of a trust and holds it in trust for the beneficiary. See MCL 700.7401; *Equitable Trust Co v Milton Realty Co*, 261 Mich 571, 577; 246 NW 500 (1933) (holding that "[t]o create a trust, there must be an assignment of designated property to a trustee with the intention of passing title thereto, to hold for the benefit of others").[15] The trust beneficiary, on the other hand, holds a right to "enforce the performance of the trust in equity." MCL 555.16. See also *Union Guardian Trust Co v Nichols*, 311 Mich 107; 18 NW2d 383 (1945). Unless the beneficiary is also a trustee, the beneficiary does not own the property forming the principal of the irrevocable trust. If either spouse retained possession and use of trust property,

[14] While "held" is undefined in the statute, *Merriam-Webster's Collegiate Dictionary* (11th ed) relevantly defines "hold" as "to have possession or ownership of or have at one's disposal[.]" "When a word or phrase is not defined by the statute in question, it is appropriate to consult dictionary definitions to determine [its] plain and ordinary meaning . . . ." *People v Rea*, 500 Mich 422, 428; 902 NW2d 362 (2017).

[15] *Black's Law Dictionary* similarly defines a "trustee" as "[s]omeone who stands in a fiduciary or confidential relation to another; esp., one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary." *Black's Law Dictionary* (10th ed).

then the question might be closer, but that question is not raised here. In summary, the principal of an irrevocable trust generally will not be a resource available to either spouse according to 42 USC 1396r-5(c), because such property is not held by either spouse. The principal of an irrevocable trust may, however, be made legally available to an institutionalized spouse by way of the Medicaid trust rules contained in 42 USC 1396p(d).

2. 42 USC 1396p(d): THE MEDICAID TRUST RULES

The first two paragraphs of the Medicaid trust rules describe to whom the rules apply and how to determine whether that person created a trust. Paragraph (1) of the Medicaid trust rules begins by stating, "For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual."[16] 42 USC 1396p(d)(1). While, generally speaking, an "individual" is "a particular being or thing," i.e., "a single human being," *Merriam-Webster's Collegiate Dictionary* (11th ed), the context of a term's usage in a statute affects its meaning, see *South Dearborn*, 502 Mich at 361. Here, the context in which "an individual" is used limits the scope of possible human beings to which 42 USC 1396p(d)(1) refers.

Paragraph (1) provides that Subsection (d) applies to determining "an individual's eligibility for, or amount of, benefits . . . ." 42 USC 1396p(d)(1). Medicaid benefits are granted only to those who apply for them and who also meet the eligibility requirements. Thus, if an eligibility determination is being made, then the "indi-

[16] Paragraph (4) provides special rules for the treatment of three types of trusts that are not at issue in this appeal. See 42 USC 1396p(d)(4).

vidual" referred to in Paragraph (1) must be an applicant for Medicaid; similarly, language directing the reader's attention to the amount of benefits provided indicates that the "individual" is either an applicant for or a current recipient of Medicaid benefits. It follows that "an individual" in 42 USC 1396p(d)(1) is a person applying for Medicaid benefits or a person who has been approved for a yet-to-be-determined amount of benefits. Applied to the context of this appeal, the individual referred to here is the institutionalized spouse, who is the Medicaid applicant. The plain language of 42 USC 1396p(d)(1) thus provides that, to determine an institutionalized spouse's eligibility for Medicaid benefits, the rules outlined in 42 USC 1396p(d)(3) govern trusts established by the institutionalized spouse.

Paragraph (2) of the same subsection provides the criteria for determining whether "an individual" has established a trust. 42 USC 1396p(d)(2). For the purposes of Subsection (d), "an individual" has

> established a trust if assets[17] of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

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[17] 42 USC 1396p(h) provides the following definition of "assets":

> (1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action—
>
> (A) by the individual or such individual's spouse,
>
> (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or
>
> (C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including any court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse. [42 USC 1396p(d)(2)(A).]

Therefore, when a community spouse creates a trust, other than by will, using assets of his or her institutionalized spouse, that action is legally attributed to the

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The Court of Appeals cited this definition for the proposition that "Congress has clearly indicated that an institutionalized individual's assets include not only those that he or she has, but *also* those that his or her spouse has, 42 USC 1396p(h)(1), and that remains true even when those assets are placed into a trust by the spouse, 42 USC 1396d(d)(2)(A)(i) and (ii)." *Hegadorn v Dep't of Human Servs Dir*, 320 Mich App 549, 569; 904 NW2d 904 (2017). This statement is partially correct.

Generally speaking, marital assets are considered jointly, and before the trusts were formed, income and resources belonging to the community spouse would be considered assets of the institutionalized spouse. However, once resources are moved into an irrevocable trust, they cease being assets owned or held by either spouse and become assets owned and held by the trust or trustee. Moreover, transferring one's income and property to one's spouse or directly into a trust is not an "action . . . by the individual or such individual's spouse" that deprives either spouse of "resources which the individual or such individual's spouse is entitled to . . . ." 42 USC 1396p(h)(1). Resources that one presently has both title to and possession of are not resources that one is entitled to in the future, and transferring away such resources does not trigger 42 USC 1396p(h)(1). This is consistent with CMS's interpretation of the definition of "asset," see CMS, *State Medicaid Manual*, § 3257(B)(3) (rev 64), which lists among the examples of actions that trigger the asset rule: (a) waiving the right to payment of pension income, (b) waiving a right to receive an inheritance, (c) rejecting or refusing to accept injury settlements, and (d) diverting tort settlements. Each example presents a situation in which someone has a legal right to receive income or property in the future, but that right is never realized because of some affirmative action. Such conditions do not exist here.

institutionalized spouse for the purposes of the institutionalized spouse's Medicaid eligibility determination.

Deciding that an institutionalized spouse is an individual who has established a trust does not, however, end the inquiry. Paragraph (2) only describes the conditions for when a Medicaid applicant is deemed to have established a trust. The rules described in Paragraph (3) govern whether the assets held by such a trust are available to the Medicaid applicant and thus countable for his or her initial eligibility determination.

3. 42 USC 1396p(d)(3)(B): THE ANY-CIRCUMSTANCES RULE

Once it is determined that a Medicaid applicant has established a trust, the question becomes whether assets held by the trust are available to the applicant. The trust rules in 42 USC 1396p(d)(3) treat revocable trusts and irrevocable trusts differently. Generally, the principal of a revocable trust is always considered an asset available to the Medicaid applicant who formed the trust. See 42 USC 1396p(d)(3). This is unsurprising, as a trustor can typically dissolve a revocable trust and reclaim title and possession of those things held by the trust.

The rules for irrevocable trusts are more intricate. Notably, the rules do not assume that assets placed in an irrevocable trust are available to the Medicaid applicant. Instead, when assessing an irrevocable trust, the "any-circumstances rule" applies:

> (i) if there are *any circumstances* under which *payment from the trust could be made to or for the benefit of the individual*, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made *shall be considered resources available to the individual*, and payments from that portion of the corpus or income—

> (I) to or for the benefit of the individual, shall be considered income of the individual, and
>
> (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and
>
> (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual *shall be considered*, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) *to be assets disposed by the individual for purposes of subsection (c)*, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date. [42 USC 1396p(d)(3)(B) (emphasis added).]

Focusing on the statutory language, "any" is undefined within the statute itself, but is commonly defined as "one or some indiscriminately of whatever kind" or "one, some, or all indiscriminately of whatever quantity." *Merriam-Webster's Collegiate Dictionar*y (11th ed). Thus, the use of the term "any circumstances" demonstrates that we are to consider not only obvious circumstances, but also those that are hypothetical or even unlikely. However, the rule also includes key limitations. The rule instructs us to consider only possible "payments from the trust," indicating that there must be a nexus between the trust and the recipient or beneficiary of the payment. We are next told that only those payments that could be made "to or for the benefit of the individual" fall within the rule. If there are circumstances under which payments from the trust can be made to or for the benefit of the individual, then the portion of the principal of the trust from which such payments would come is deemed available to the individual, and thus countable for determining the individual's eligibility for Medicaid benefits. If no such circumstances exist, then the portion of the principal

derived from the applicant's assets is not a countable asset for the applicant's eligibility determination. See 42 USC 1396p(c).[18]

Correctly applying the any-circumstances rule requires understanding to whom "the individual" refers in 42 USC 1396p(d)(3)(B). The Department urges us to read "the individual" as referring to anyone whose resources must be evaluated in assessing a Medicaid application, without regard to whether that person is the Medicaid applicant or the applicant's spouse. Applied here, the Department reads "the individual" as referring to the person applying for Medicaid benefits (the institutionalized spouse), the community spouse, or both. This was also the meaning adopted by the Court of Appeals. However, we conclude that this interpretation suffers from several critical flaws.

As already discussed, the context in which a statutory term is used affects its meaning. See *South Dearborn*, 502 Mich at 361. As with Paragraphs (1) and (2) of 42 USC 1396p(d), the context in which "the individual" is used limits the scope of possible human beings to which 42 USC 1396p(d)(3)(B) refers. The first limitation is the use of the definite article "the" preceding "individual." This suggests that "the individual" referred to in 42 USC 1396p(d)(3)(B)(i) is a single person, as opposed to an open class of all people. See *Massey v Mandell*, 462 Mich 375, 382 n 5, 614 NW2d 70 (2000) (" 'The' and 'a' have different meanings. 'The' is defined as 'definite article. 1. (used, [especially] before a noun, with a specifying or particularizing

[18] If assets held by a trust are not assets available to the Medicaid applicant, then those trust assets are treated as assets transferred by the applicant, which may subject the applicant to divestment penalties. See 42 USC 1396p(c). As the Department has stated, divestment penalties are not at issue in this appeal. See Appellee's Brief, p 14.

effect, as opposed to the indefinite or generalizing force of the indefinite article a or an) . . . .' *Random House Webster's College Dictionary*, p 1382.").

Additionally, Paragraph (1) of Subsection (d) begins by stating, "[f]or purposes of determining *an individual's* eligibility for, or amount of," Medicaid benefits, "the rules specified in paragraph (3) shall apply to a trust established by *such individual*." 42 USC 1396p(d)(1) (emphasis added). As discussed in Part III(B)(2) of this opinion, Paragraph (1) uses "an individual" to refer to a person applying for Medicaid benefits or a person who qualifies for benefits, but the amount of those benefits must be determined.[19] Paragraph (1) then states that Paragraph (3) applies to a trust established by that applicant or recipient. Thus, while "an individual" in Paragraph (1) can be read as referring to a potential class of persons, when "such individual" establishes a trust, that class is reduced to a single person for the purposes of Paragraph (3). Paragraph (2) of Subsection (d) also refers to "an individual" when describing whether such individual established a trust, and it contrasts that term with "the individual's spouse." 42 USC 1396p(d)(2)(A)(i) and (ii).

Reading these provisions together, it follows that when Paragraph (3) refers to "the individual," it is referring to the same individual whose eligibility for, or amount of, benefits is being determined and who has established a trust under Paragraph (2): the applicant for or recipient of Medicaid benefits. When considering

[19] The *State Medicaid Manual* generally uses the term "individual" in the same manner: "Individuals to Whom Trust Provisions Apply.—This section applies to any individual who establishes a trust and who is an applicant for or recipient of Medicaid." CMS, *State Medicaid Manual*, § 3259.3 (rev 64), p 3-3-109.26.

the eligibility of an institutionalized spouse for Medicaid benefits, "the individual" must be read as referring to the institutionalized spouse to the exclusion of the community spouse, who, by definition, is not applying for or receiving Medicaid benefits.[20]

We find further support for this reading by reference to markedly different language in the rules governing trusts under the SSI program. See 42 USC 1382b(e)(2) and (3). The SSI program contains a nearly identical any-circumstances rule with one key difference: it explicitly differentiates between the individual and the individual's spouse. See 42 USC 1382b(e)(3)(B) ("[I]f there are any circumstances under which payment from the trust could be made to or for the benefit of *the individual* (*or of the individual's spouse*) . . . .") (emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v United States*, 464 US 16, 23; 104 S Ct 296; 78 L Ed 2d 17 (1983) (quotation marks and citation omitted). See also *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."). When Congress intended a provision of the Medicaid or SSI statutes to apply to both the applicant and the

[20] According to CMS, there may be an exception to this rule when the community spouse is acting on the applicant's behalf. See CMS, *State Medicaid Manual*, § 3259.6(D), p 3-3-109.29 ("Payments are considered to be made to the individual when any amount from the trust . . . is paid directly to the individual *or to someone acting on his/her behalf*, e.g., *a guardian or legal representative*.") (emphasis added). However, we need not reach this issue today.

applicant's spouse, it has stated so expressly. Moreover, the Medicaid trust rules in 42 USC 1396p(d) were added by OBRA 93, six years before Congress added the SSI trust rules in 42 USC 1382b(e) with the Foster Care Independence Act of 1999, PL 106-169; 113 Stat 1822. Had Congress intended the two rules to operate identically, as the Department suggests, then Congress likely would have used identical language in both 42 USC 1396p(d)(3)(B) and 42 USC 1382b(e)(3)(B).[21]

Reading "the individual" in this manner and in the context of this appeal, 42 USC 1396p(d)(3)(B) refers only to an institutionalized spouse and not a community spouse. As *BEM 401* is based primarily on 42 USC 1396p(d)(3)(B) and incorporates the any-circumstances rule into Michigan's Medicaid policies, this same restriction applies to *BEM 401*, despite the use of the term "person" in place of "individual." The any-circumstances rule, therefore, makes assets held by an irrevocable

[21] The Department further argues that *BEM 401* requires evaluating a Medicaid applicant's resources under both the Medicaid and the SSI any-circumstances rules. We find no legal support for this proposition. First, as already discussed, *BEM 401* cites 42 USC 1396a and 42 USC 1396p as the legal basis for the rule, not 42 USC 1382b(e). Second, Michigan's state Medicaid plan states that the Department "complies with the provisions of section 1917d of the [Social Security] Act, as amended by OBRA 93, with regard to trusts." Michigan Department of Health and Human Services, *State Plan Under Title XIX of the Social Security Act Medical Assistance Program*, Attachment 2.6A, p 26 (effective July 1, 1996). Section 1917d is codified at 42 USC 1396p(d), not 42 USC 1382b(e). Third, the Department's argument is foreclosed by 42 USC 1396a(a)(10)(G), which instructs a state to "disregard the provisions of subsections (c) and (e) of section [42 USC] 1382b" when it applies the "eligibility criteria of the [SSI] program under subchapter XVI for purposes of determining eligibility for medical assistance under the State plan of an individual who is not receiving [SSI] . . . ." Congress added 42 USC 1396a(a)(10)(G) and the SSI trust rules with the enactment of the Foster Care Independence Act. Plaintiffs here are medically needy applicants who are not receiving SSI; therefore, 42 USC 1382b(c) and (e) do not apply to evaluating their eligibility for Medicaid benefits.

trust available to an institutionalized spouse if there are any circumstances, whether likely or hypothetical, under which the trust could make a payment to or for the benefit of the institutionalized spouse. If an irrevocable trust can make payments only to the community spouse, then those payments will satisfy the any-circumstances rule only if there is evidence that the payments could be for the benefit of the institutionalized spouse.[22] If application of 42 USC 1396p(d)(3)(B) makes assets held by an irrevocable trust available to an institutionalized spouse, then the value of such assets is countable for the purposes of 42 USC 1396r-5(c).

There is no inconsistency created by our reading of 42 USC 1396r-5 and 42 USC 1396p(d), and therefore the preemptive provision of 42 USC 1396r-5(a)(1) does not apply.[23] As discussed before, the general resource-allocation rules of 42 USC 1396r-5(c), on their own, do not treat assets held by a trust as a resource available to either spouse. If a resource is not available to either spouse, then it is not a countable asset for the purpose of an institutionalized spouse's initial eligibility deter-

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[22] The Supreme Judicial Court of Massachusetts interprets the any-circumstances rule, 42 USC 1396p(d)(3)(B)(i), in the same manner. See *Daley v Secretary of Executive Office of Health & Human Servs*, 477 Mass 188, 193; 74 NE3d 1269 (2017) ("The effect of the [any-circumstances] test is that if the trustee is afforded even a 'peppercorn of discretion' to make payment of principal to the applicant, or if the trust allows such payment based on certain conditions, then the entire amount that the applicant could receive under 'any state of affairs' is the amount counted for Medicaid eligibility.").

[23] 42 USC 1396r-5(a)(1) states:

> In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1)), the provisions of this section supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

mination. See 42 USC 1396r-5(c)(2). The specific provisions governing the treatment of trusts in 42 USC 1396p(d) make the vast majority of assets held by a trust created by an institutionalized spouse available to that spouse by operation of law, while leaving open the possibility that some such assets will remain legally unavailable. The general provisions of 42 USC 1396r-5 can therefore be read in harmony with the specific provisions of 42 USC 1396p(d), and no inconsistency exists. See *People v Calloway*, 500 Mich 180, 185-186; 895 NW2d 165 (2017) ("[W]hen a statute contains a general provision and a specific provision, the specific provision controls."); *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015) ("Under the [*in pari materia*] doctrine, statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law.").

In summary, the principal of an irrevocable trust formed solely for the benefit of a community spouse is not per se a "resource available" to an institutionalized spouse under 42 USC 1396r-5(c)(2) for the purpose of determining an institutionalized spouse's eligibility for Medicaid benefits. Assets making up the principal of such a trust are not automatically considered countable assets for Medicaid eligibility determinations. However, the principal of an irrevocable trust *may* become a resource available to an institutionalized spouse, and thus a countable asset, if the following conditions are met: (1) assets of the institutionalized spouse are used to form the principal of the trust, 42 USC 1396p(d)(2)(A); (2) the institutionalized spouse, his or her spouse, or one of the other entities listed under 42 USC 1396p(d)(2)(A)(i) through (iv) established the trust using a means other than a will; and (3) there are "any circumstances under which payment

from the trust could be made to or for the benefit of" the institutionalized spouse, 42 USC 1396p(d)(3)(B)(i).

IV. APPLICATION

To determine whether the SBO trusts at issue allow for a payment to be made "to or for the benefit of" the institutionalized spouses, we must look to the language of the trust documents themselves. 42 USC 1396p(d)(3)(B); *BEM 401* at 10. If the principal of each SBO trust at issue is rightly considered to be a countable asset, the Department properly denied plaintiffs' applications. However, if the Department has deemed, as countable assets, property that the federal statutes do not consider available to plaintiffs, then the Department's decisions are contrary to law.

It is undisputed that each plaintiff is an individual whose eligibility for Medicaid benefits is being determined under 42 USC 1396p(d)(1). It is also undisputed that, in each case, assets of the institutionalized spouse were used to establish the SBO trusts. Accordingly, the institutionalized spouses in these cases are individuals who have established a trust pursuant to 42 USC 1396p(d)(2). The SBO trusts at issue are irrevocable trusts, meaning the principal of each trust is not automatically rendered available to the institutionalized spouse. 42 USC 1396p(d)(3)(A) and (B). Furthermore, the property and income that make up the principal of the SBO trusts at issue are not held by the institutionalized spouses or the community spouses. Rather, title to the property that is now the principal of each trust was transferred to the trust or trustee, and the money that forms part of the principal was moved into bank accounts controlled by the trustee. There also has been no suggestion that the community spouses retain possession of the tangible property that forms the princi-

pals of the trusts. Therefore, the principals of the SBO trusts are not automatically considered resources available to any of the spouses under 42 USC 1396r-5(c). Accordingly, the principal of each SBO trust can be considered a resource available to the institutionalized spouse, and thus a countable asset, only if made so by operation of the any-circumstances rule in 42 USC 1396p(d)(3)(B).

As the Court of Appeals correctly noted, each of the SBO trusts at issue instructs the trustee to "use up" or deplete the entirety of the principal during the community spouse's lifetime. All three SBO trusts also include language instructing the trustees to distribute the assets "on a[n] actuarially sound basis," which means that the "spending must be at a rate that will use up all the resources during the person's lifetime." *BEM 405* (July 1, 2014), p 12. However, the Court of Appeals erroneously concluded that, because the community spouses could be paid by the trusts, this automatically created a " 'condition under which the principal could be paid to or on behalf of the person from an irrevocable trust,' " meaning that "the assets in each trust were properly determined to be countable assets by the Department. *BEM 401* at 12." *Hegadorn v Dep't of Human Servs Dir*, 320 Mich App 549, 563-564; 904 NW2d 904 (2017). The Court of Appeals read the word "person" in *BEM 401* as referring to both the applicants and their spouses in all circumstances. As already discussed, the rule in *BEM 401* is derived from 42 USC 1396a and the any-circumstances rule in 42 USC 1396p(d)(3)(B). The any-circumstances rule makes assets in an irrevocable trust available to a Medicaid applicant only if there are circumstances under which "a payment from the trust" could be made "to or for the benefit of" the applicant. 42 USC 1396p(d)(3)(B). The Department's contrary interpreta-

tion and application of *BEM 401*, which incorporates the federal any-circumstances rule into Michigan's Medicaid policies, is not entitled to respectful consideration because it is foreclosed by the text of 42 USC 1396p(d)(3)(B). See *Rovas*, 482 Mich at 108.

In determining whether payments can be made from a trust to an individual or for the individual's benefit, CMS instructs the Department to "take into account any restrictions on payments, such as use restrictions, exculpatory clauses, or limits on trustee discretion that may be included in the trust." CMS, *State Medicaid Manual*, § 3259.6(E) (rev 64), p 3-3-109.30. The SBO trusts at issue all contain language stating that distributions or payments from the trust may only be made to or for the *benefit* of the *respective community spouse* and that the trust resources may be used only for the *community spouse's benefit*.[24] The ALJs and the Court of Appeals recognized this but erred by concluding that payments to or for the benefit of the community spouses were available to the institutionalized spouses. Because the community spouses are not themselves applying for or receiving Medicaid benefits, they are not "the individual" referred to in 42 USC 1396p(d)(3)(B).[25] Thus, the Court of Appeals erred by

[24] See Lollar Trust, § 2.2 ("Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime . . . part or all of the net income and principal . . . . During my lifetime, no Resources of the Trust can be used for anyone other than me, except for Trustee fees."); Hegadorn Trust, § 2.2 ("Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime . . . part or all of the net income and principal . . . . During my lifetime, no Resources of the Trust can be used for anyone other than me."); Ford Trust, § 2.2 ("Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime . . . part of the net income and principal . . . . During my lifetime, no Resources of the Trust may be used for anyone other than me, except for Trustee Fees.").

[25] We note that CMS has advised that "the individual" might some-

holding that the possibility of a distribution from each SBO trust to each community spouse automatically made the assets held by each SBO trust countable assets for the purposes of the respective institutionalized spouses' initial eligibility determination.[26] Accordingly, we reverse the Court of Appeals judgment because it was premised on an incorrect reading of the controlling statutes and thus was contrary to law. It follows that the ALJs' decisions are also contrary to law and cannot stand, given that they all suffer from

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times include an applicant's spouse when that spouse is acting on behalf of the applicant. See CMS, *State Medicaid Manual*, § 3257(B)(1), p 3-3-109 ("As used in this instruction, the term 'individual' includes the individual himself or herself, as well as . . . [t]he individual's spouse, *where the spouse is acting in the place of or on behalf of the individual*[.]") (emphasis added); § 3259.6(D), p 3-3-109.29 ("Payments are considered to be made to the individual when any amount from the trust . . . is paid directly to the individual *or to someone acting on his/her behalf*, e.g., *a guardian or legal representative*.") (emphasis added). There are documents in the administrative record indicating that Mr. Hegadorn was made the legal guardian of his wife prior to creating the Hegadorn Trust and that Mrs. Lollar granted to her husband a durable power of attorney prior to the creation of the Lollar Trust. ALJ Lain made no findings of fact or conclusions of law with regard to these legal instruments, and the Department has not argued that these documents should affect our analysis. Accordingly, we decline to address whether these legal instruments affect plaintiffs' eligibility for benefits at this time.

[26] We acknowledge that our decision on this issue is at odds with the opinion of the United States Court of Appeals for the Third Circuit in *Johnson v Guhl*, 357 F3d 403, 408-409 (CA 3, 2004) (holding that 42 USC 1396p(d)(3)(B)(i) is satisfied if "[o]nce the community spouse receives these payments, there is nothing preventing her or him from sharing them with the institutionalized spouse as well."). While the Third Circuit appears to agree that "the individual" refers to an applicant for or recipient of Medicaid benefits, its conclusory analysis disregards the statutory language requiring that the payment be a "payment *from the trust*" that "could be made *to or for the benefit of* the individual." 42 USC 1396p(d)(3)(B)(i) (emphasis added). The Third Circuit's broad language also effectively reads away any difference in the language used in the § 1396p(d)(3) any-circumstances rule and the § 1382b(e) any-circumstances rule.

the same faulty reasoning employed by the Court of Appeals. See MCL 24.306(1)(a) and (f).

The question now becomes what relief should be granted. The APA gives this Court some discretion in crafting relief that is appropriate to each case arising from an administrative appeal. See MCL 24.306(2) ("The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings."). The sheer complexity of the Medicaid program and the Department's legitimate concerns about potential abuse are paramount considerations in determining what relief is warranted. We further note that, given the reasoning employed in resolving the administrative appeals, the ALJs may have forgone consideration of alternative avenues of legal analysis. In light of these concerns, we decline to order that the Department approve plaintiffs' Medicaid applications at this time. Instead, we vacate the final administrative hearing decision in each case and remand each case to the appropriate administrative tribunal for the proper application of the any-circumstances test. If the ALJs determine that circumstances exist under which payments from the trusts could be made to or for the benefit of the institutionalized spouse, then the ALJs should explain this rationale and affirm the Department's decision. However, if no such circumstances exist, the ALJs should reverse the Department's decisions and order that the Medicaid applications be approved.

V. CONCLUSION

Neither 42 USC 1396r-5 nor 42 USC 1396p(d) automatically makes marital assets placed in an irrevocable trust for the sole benefit of a community spouse countable assets for the purpose of an institutionalized

spouse's initial eligibility determination. Rather, such assets become countable only if circumstances exist under which the trust could make a payment to or for the benefit of the institutionalized spouse. Accordingly, we reverse the judgment of the Court of Appeals.

Because the ALJs' decisions were largely grounded in the same flawed legal reasoning that was employed by the Court of Appeals, we vacate the final hearing decision of the ALJ in each case. We remand all three cases for any additional administrative proceedings necessary to evaluate the legal validity of the Department's decision to deny each plaintiff's Medicaid application. See MCL 24.306(2). We do not retain jurisdiction.

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO, and CLEMENT, JJ., concurred with BERNSTEIN, J.

MCCORMACK, C.J. (*concurring*). The plaintiffs[1] applied for Medicaid to help defray the costs of nursing-home services. That's what Medicaid is for, but eligibility for its financial assistance is means-tested. To satisfy Medicaid's income and resource limits while preserving their assets, the plaintiffs each formed and funded an irrevocable "solely for the benefit of" (SBO) trust. The critical feature of these SBO trusts is that during each plaintiff's *spouse's* lifetime, distributions from the trusts could be made only to that spouse. I agree with the majority that property held in these SBO trusts is not countable toward Medicaid's resource limit because "the individual" in 42 USC 1396p(d)(3)(B) refers to the Medicaid applicant.

But I also believe that the plaintiffs' transfer of assets into the trusts triggers Medicaid's divestment rules.

[1] "The plaintiffs" refers to the original plaintiffs who began these proceedings.

This issue has not been presented here, for understandable procedural reasons. I believe such a discussion is necessary, however, as a caution. If I am correct, then the plaintiffs' overall planning strategy would be undermined: although they would be able to satisfy Medicaid's threshold resource test, the plaintiffs would be disqualified from receiving Medicaid benefits for a time period calculated by reference to the value of the transferred assets. And because their strategy involves irrevocable trusts, there is no way to unwind the transfer. In short, the majority opinion should not be interpreted as permitting a married Medicaid applicant to shelter and preserve any amount of wealth without restriction, and then immediately receive financial assistance as if she did not have it.

I. MEDICAID BACKGROUND

The federal Medicaid Assistance Program (Medicaid), enacted as Title XIX of the Social Security Act, 42 USC 1396 *et seq*. (the Medicaid Act or the Act), is a program through which the federal government shares, along with participating states, the cost of providing financial assistance for medical services to "families with dependent children and [to] aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services . . . ." 42 USC 1396-1. State participation in the program is optional. States that do participate, however, must comply with federal law, including those provisions set forth in 42 USC 1396p regarding "liens, adjustments and recoveries of medical assistance correctly paid[,] transfers of assets, and treatment of certain trusts[.]" 42 USC 1396a(a)(18). In Michigan, the program is administered by the Department of Health

and Human Services (the Department), of which defendant is the director. MCL 400.105; see note 5 of the majority opinion.

To be eligible for Medicaid financial assistance for nursing-home services, each plaintiff's countable assets[2] could not exceed $2,000. See Part III(B)(1) of the majority opinion. The plaintiffs established these SBO trusts to reduce their countable assets to satisfy this limit.

A. ELIGIBILITY FOR NURSING-HOME SERVICES

For married applicants such as the plaintiffs, the eligibility rules for nursing-home services begin with the "spousal impoverishment" provisions of the Medicaid Act. See 42 USC 1396r-5. Enacted by Congress in 1988, these provisions "permit a spouse living at home (called the 'community spouse') to reserve certain income and assets to meet the minimum monthly maintenance needs he or she will have when the other spouse (the 'institutionalized spouse'[3]) is institutionalized,

[2] The term "assets" encompasses both "resources" and "income." 42 USC 1396p(h)(1). While the parties use the term "countable assets" to refer to Medicaid's nonincome eligibility criteria, it should be understood that, for purposes of determining financial eligibility, "resources" and "income" are evaluated differently. See 42 USC 1396r-5(b) and (c) and Part I(A) of this opinion.

[3] The term "institutionalized spouse" refers to "an individual who . . . is in a medical institution or nursing facility . . . and . . . is married to a spouse who is not in a medical institution or nursing facility[.]" 42 USC 1396r-5(h)(1). The "community spouse" is "the spouse of an institutionalized spouse." 42 USC 1396r-5(h)(2). Elsewhere, Congress has used the term "institutionalized individual" to refer to "an individual who is an inpatient in a nursing facility . . . ." 42 USC 1396p(h)(3). Congress, however, has not provided a specific definition for the spouse of an "institutionalized individual," presumably because 42 USC 1396p (unlike the spousal-impoverishment provisions) applies to Medicaid applicants regardless of their marital status. More confusing yet, Congress in 42 USC 1396p uses undefined terms such as "an individual," "the individual," and "the individual's spouse."

usually in a nursing home, and becomes eligible for Medicaid." *Wis Dep't of Health & Family Servs v Blumer*, 534 US 473, 478; 122 S Ct 962; 151 L Ed 2d 935 (2002).

Congress achieved this in two ways. First is the treatment of income. For any month in which the institutionalized spouse receives nursing-home services, the Medicaid Act provides that "no income of the community spouse shall be deemed available to the institutionalized spouse." 42 USC 1396r-5(b)(1). "The community spouse's income is thus preserved for that spouse and does not affect the determination whether the institutionalized spouse qualifies for Medicaid. In general, such income is also disregarded in calculating the amount Medicaid will pay for the institutionalized spouse's care after eligibility is established." *Blumer*, 534 US at 480-481; see 42 USC 1396r-5(b)(2). The spousal-impoverishment provisions also establish a "minimum monthly maintenance needs allowance." 42 USC 1396r-5(d)(3). Under 42 USC 1396r-5(d), if the community spouse's income is ever less than the allowance, the Act permits the institutionalized spouse to reallocate her income (up to the amount of the shortfall) to the community spouse, thereby resulting in Medicaid's paying a greater portion of the institutionalized spouse's nursing-home expenses. *Blumer*, 534 US at 481-482.

The second way in which Congress protects a community spouse is through the Act's treatment of marital resources and the "community spouse resources allowance" (CSRA). As the Court explained in *Blumer*:

> For purposes of establishing the institutionalized spouse's Medicaid eligibility, a portion of the couple's assets is reserved for the benefit of the community spouse. [42 USC 1396r-5(c)(2)]. To determine that reserved amount (the

> CSRA), the total of all of the couple's resources (whether owned jointly or separately) is calculated as of the time the institutionalized spouse's institutionalization commenced; half of that total is then allocated to each spouse (the "spousal share"). [42 USC 1396r-5(c)(1)(A)]. The spousal share allocated to the community spouse qualifies as the CSRA, subject to [a statutory maximum and minimum]. The CSRA is considered unavailable to the institutionalized spouse in the eligibility determination, but all resources above the CSRA (excluding a small sum set aside as a personal allowance for the institutionalized spouse, currently $2,000 . . .) must be spent before eligibility can be achieved. [42 USC 1396r-5(c)(2)]. [*Blumer*, 534 US at 482-483.]

Together, these rules "assur[e] that the community spouse has a sufficient—but not excessive—amount of income and resources available." *Id*. at 480 (citation and quotation marks omitted).

B. THE MEDICAID TRANSFER RULES

To prevent an institutionalized individual from simply giving away her assets to satisfy the Medicaid Act's eligibility criteria, Congress implemented a divestment penalty. This penalty is based on a look-back date—a set time before the individual's application for Medicaid benefits. 42 USC 1396p(c)(1)(B).[4] If an institutionalized individual or her spouse "disposes of assets for less than fair market value" at any point after the look-back date, 42 USC 1396p(c)(1)(A), she is disqualified from receiving financial assistance for nursing-home services for a length of time set by statutory formula, see 42 USC 1396p(c)(1)(D) and (E). That disqualification applies regardless of whether the individual is otherwise eligible for or even receiving Medicaid financial assistance. See *id*. The period of disqualification is

[4] Here, 60 months before plaintiffs' dates of application.

determined by dividing the total uncompensated value of the transferred assets by the average monthly cost of nursing-home services. 42 USC 1396p(c)(1)(E)(i).

In plainer terms, if either spouse disposes of assets for less than fair market value after the look-back date, the institutionalized spouse is disqualified from receiving financial assistance for a period that approximates the uncompensated value of the transferred assets.

But as with most rules, there are exceptions. There are certain "permissive" asset transfers, set forth in 42 USC 1396p(c)(2), that will not trigger a penalty:

> (c) Taking into account certain transfers of assets
>
> * * *
>
> (2) An individual shall not be ineligible for medical assistance by reason of [42 USC 1396p(c)(1)] to the extent that—
>
> * * *
>
> (B) the assets—
>
> (i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,
>
> (ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,
>
> (iii) were transferred to, or to a trust (including a trust described in [42 USC 1396p(d)(4)]) established solely for the benefit of, the individual's child described in [42 USC 1396p(c)(2)(A)(ii)(II),[5] or
>
> (iv) were transferred to a trust (including a trust described in [42 USC 1396p(d)(4)]) established solely for the benefit of an individual under 65 years of age who is disabled[.][6]

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[5] That is, a child who is under 21, blind, or disabled.

[6] Additionally, the Medicaid Act permits an individual to transfer his

The permissive transfers set forth at 42 USC 1396p(c)(2)(B)(i) and (ii) are important here. They allow unlimited transfers between an institutionalized individual and her spouse (that is, between the institutionalized spouse and the community spouse). This is sensible: as discussed, the Medicaid Act's resource rules require the Department to begin its initial resource evaluation by computing "the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest . . . ." 42 USC 1396r-5(c)(1)(A)(i); see *Blumer*, 534 US at 482-483.

Again, in plainer terms: there is no reason to penalize an interspousal transfer of assets because resources belonging to both spouses are combined in determining an applicant's *eligibility*. Because spousal resources are accounted for in the Medicaid eligibility process no matter which spouse holds them, there is no need to penalize a transfer from one spouse to the other.

In addition to interspousal transfers, the Medicaid Act does not penalize a transfer from either spouse to a third party if the transfer is "for the sole benefit of" the Medicaid applicant's spouse (the community spouse). 42 USC 1396p(c)(2)(B)(i) and (ii). Unlike interspousal transfers, however, this exception can have a much greater impact on eligibility, because resources that are "held" by a third party might not be considered count-

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or her home without incurring a penalty, so long as the transferee is the individual's spouse or, under specific conditions, close relatives. 42 USC 1396p(c)(2)(A). While the value of an individual's home is generally not included in the initial resource evaluation, a home is considered an "asset" for purposes of the transfer rules. See 42 USC 1396p(c)(5); 42 USC 1382b(a)(1). Thus, a transfer of the home after the look-back date will incur a divestment penalty, unless the transfer is specifically permitted under 42 USC 1396p(c)(2)(A).

able assets for purposes of Medicaid's financial eligibility determination. See 42 USC 1396r-5(c)(2)(A) ("In determining the resources of an institutionalized individual . . . [,] except as provided in subparagraph (B) [concerning the CSRA], all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse . . . ."). This exemption is pivotal to the plaintiffs' Medicaid planning strategy; if the transfers of assets into the SBO trusts are not "for the sole benefit of" the community spouse, then the transfers should incur a divestment penalty.

Congress also provided specific transfer rules for two categories of assets: the purchase of an annuity and the purchase of a promissory note, loan, or mortgage. For annuities, 42 USC 1396p(c)(1)(F) provides that "the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value"—that is, a penalized transfer—"unless . . . (i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual under this subchapter; or (ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value." This provision ensures that if a community-spouse annuitant does not survive the annuity's term, the state agency, rather than a third-party beneficiary or heir (other than a minor or disabled child), will be paid the remaining annuity payments up to the total amount of Medicaid assistance paid on behalf of the institutionalized spouse.[7]

[7] Likewise, Congress has required a state payback provision to be

See *Hutcherson v Arizona Health Care Cost Containment Sys Admin*, 667 F3d 1066, 1070 (CA 9, 2012) ("We will give the plain meaning to the unambiguous language in § 1396p(c)(1)(F)(i), which allows states to reach a deceased community spouse's annuity for costs incurred on behalf of an institutionalized spouse.").

Additionally, 42 USC 1396p(c)(1)(G) provides that an annuity "purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services" will be treated as an "asset" unless the annuity is purchased with proceeds from certain retirement accounts or the annuity contract is irrevocable and nonassignable, the contract is actuarially sound, and the payments are equal during the term of the annuity. The Department has interpreted these latter requirements (irrevocable and nonassignable, actuarially sound, and providing for equal monthly payments) as applying to all annuities purchased with countable resources; otherwise, the transfer is subject to penalty. See Michigan Department of Health and Human Services, *Bridges Eligibility Manual 401* (July 2014), p 5.[8] The purchase of a community-spouse annuity that satisfies the requirements of 42 USC 1396p(c)(1)(F) and (G)—a "qualified" community-

included in any trust that is exempt from the general trust rules. See 42 USC 1396p(d)(4). Thus, while certain transfers of assets into exempt trusts are permitted penalty-free, see 42 USC 1396p(c)(2)(B)(iii) and (iv), those assets are still subject to a Medicaid payback. The only nonpenalized transfer of assets not subject to Medicaid payback, other than transfers "for the sole benefit of" the community spouse, are transfers directly to a blind or disabled child and the transfer of a home under specific conditions. See 42 USC 1396p(c)(2)(B)(iii) (incorporating the description of a blind or disabled child in 42 USC 1396p(c)(2)(A)(ii)(II)); 42 USC 1396p(c)(2)(A).

[8] The Medicaid Act also requires an applicant to disclose in her application any interest she or her spouse has in an annuity, regardless of whether the annuity is countable as a resource. See 42 USC 1396p(e).

spouse annuity—will not trigger a divestment penalty, because the transfer is for "the sole benefit of" the community spouse. 42 USC 1396p(c)(2)(B)(i) and (ii).

For the purchase of a debt obligation, 42 USC 1396p(c)(1)(I) provides, for purposes of the transfer rules, that "the term 'assets' includes funds used to purchase a promissory note, loan, or mortgage," unless the debt instrument: (i) has an actuarially sound repayment term, (ii) is payable in equal installments, and (iii) does not allow for cancellation of the balance upon the death of the lender. 42 USC 1396p(c)(1)(I)(i) through (iii). In plainer terms, if the debt instrument does not satisfy these requirements, the transferred assets (the assets used to purchase the note, loan, or mortgage) will be subject to a divestment penalty.

While there is considerably less caselaw addressing 42 USC 1396p(c)(1)(I) than that addressing annuities, when such transfers are challenged, courts have considered whether the transaction is bona fide or an attempt to circumvent the Medicaid eligibility and transfer rules. See *Landy v Velez*, 958 F Supp 2d 545, 554 (D NJ, 2013) ("To be bona fide, an informal cash loan must (1) be enforceable under state law, (2) be in effect at the time of the transaction, (3) contain an acknowledgement of an obligation to repay and (4) have a plan for repayment (5) which is feasible in light of 'the amount of the loan, the [borrower]'s resources and income, and the [borrower]'s living expenses.' "), quoting Social Security Administration, *Program Operations Manual System*, SI 01120.220(D)(1) through (5).

These annuity and debt obligation rules were added by the Deficit Reduction Act of 2005, PL 109-171; 120 Stat 4 (the DRA). In enacting the DRA, Congress "sought to further close loopholes in the Medicaid Act." *Hutcherson*, 667 F3d at 1069. The DRA achieved this

by "restrict[ing] the use of annuities by Medicaid applicants in order to prevent applicants from sheltering their assets in anticipation of Medicaid eligibility." *Carlini v Velez*, 947 F Supp 2d 482, 486 (D NJ, 2013); see also *Morris v Oklahoma Dep't of Human Servs*, 685 F3d 925, 935-938 (CA 10, 2012) (explaining how the conversion of spousal resources into a stream of future payments for the community spouse exploits the Act's separate treatment of income postinstitutionalization). Such restrictions further Congress's interest in "preventing financially secure couples from obtaining Medicaid assistance." *Blumer*, 534 US at 480.

All these restrictions make little sense, however, if 42 USC 1396p(c) and (d) allow married couples to immediately transfer unlimited assets to a community spouse, without incurring any divestment penalty, simply by placing assets into an SBO trust.

C. MEDICAID'S TRUST RULES

Section 1396p(d) provides a "comprehensive system of asset-counting rules for determining who qualifies for Medicaid." *Lewis v Alexander*, 685 F3d 325, 332 (CA 3, 2012). Enacted by the Omnibus Budget Reconciliation Act (OBRA) of 1993, PL 103-66; 107 Stat 312, see Part III(A) of the majority opinion, the current trust rules responded to "Medicaid's original asset-counting rules, [under which] individuals could put large sums of money in trust, thereby vesting legal title to those assets in the trust and reducing (on paper) the amount of assets owned by the individual." *Lewis*, 658 F3d at 332. "In the 1993 OBRA amendments, Congress established a general rule that trusts would be counted as assets for the purpose of determining Medicaid eligibility." *Id*. at 333.

The majority has explained well the general rules for revocable and irrevocable trusts. But one feature bears emphasis: Congress has specifically exempted three types of trusts from those general trust rules. See 42 USC 1396p(d)(4)(A) through (C).[9] Two of these "(d)(4) trusts"—special-needs trusts and pooled trusts (42 USC 1396p(d)(4)(A) and (C))—allow a *disabled* beneficiary to receive assets without disqualifying the beneficiary for Medicaid assistance. The third, a qualified-income trust (42 USC 1396p(d)(4)(B)), allows individuals in certain states to control the amount of income used to determine Medicaid eligibility. All of these trusts serve very different purposes than SBO trusts. But just as with the rules for annuities, the rules for these exempted (d)(4) trusts require that, upon the death of the trust beneficiary (or beneficiaries), any remaining trust assets must be used to pay back the state agency up to the amount of Medicaid financial assistance expended on behalf of the trust beneficiary or beneficiaries. See 42 USC 1396p(d)(4)(A), (B)(ii), and (C)(iv).

The plaintiffs' Medicaid planning strategy—SBO trusts—implicates the general rules for irrevocable trusts at 42 USC 1396p(d)(3)(B). As the majority explains, any property held in an SBO trust is not an available "resource" of the married couple for purposes of Medicaid's financial eligibility determination, because the trust is irrevocable and legal title is held by the third-party trustee; the trust property is therefore not countable, because it "is not held by either spouse." And because the terms of these SBO trusts require that any distribution be made to the plaintiffs' spouses (the community spouses) for the spouses' lifetimes, there can

[9] And certain transfers into these (d)(4) trusts are exempt from the divestment penalty. See 42 USC 1396p(c)(2)(B)(iii) and (iv).

never be "any circumstances under which payment from the [SBO] trust could be made to or for the benefit of" these plaintiffs. 42 USC 1396p(d)(3)(B)(i).

Normally, such a transfer would trigger the divestment penalty, as the property held in trust is "assets disposed by the [institutionalized] individual for purposes of" the transfer rules. 42 USC 1396p(d)(3)(B)(ii). But according to the plaintiffs, the transfer of marital assets into these SBO trusts are exempt from the divestment penalty, because they are transfers to a third party (the trusts) "for the sole benefit of" the community spouse. See 42 USC 1396p(c)(2)(B)(i) and (ii). In short, the plaintiffs' theory is that an institutionalized individual can achieve immediate (penalty-free) eligibility for Medicaid financial assistance by simply placing any assets over the eligibility limit in an irrevocable trust, and also avoid the divestment penalty that accompanies that kind of divestment, so long as any payments from the trust are made only to the community spouse during his lifetime.

The result: a perfect loophole to Congress's carefully constructed eligibility and transfer rules.

D. THE STATUTORY TEXT: "FOR THE SOLE BENEFIT OF"

I agree with the majority that "the individual" in 42 USC 1396p(d)(3)(B) refers to the Medicaid applicant.[10]

[10] The plaintiffs emphasize that Congress did include "the individual's spouse" within what the majority describes as the "any-circumstances rule" of 42 USC 1396p(d)(3)(B), as Congress did with the comparable Supplemental Security Income (SSI) provision. While my analysis differs from that of the Court of Appeals, I agree with the panel that Congress intended for spousal resources to be evaluated jointly and that the interpretation urged by the plaintiffs runs counter to that intent, especially given the spousal-impoverishment provisions. The majority concludes that this was not a mere oversight because of Congress's inclusion of "the individual's spouse" in the rules governing the SSI

But I doubt the plaintiffs' interpretive victory will ultimately prove to be an effective Medicaid planning strategy. The strategy only works if the plaintiffs can avoid a divestment penalty. The plaintiffs believe they can do so because their transfers of assets into the SBO trusts were "for the sole benefit of" the community spouses. 42 USC 1396p(c)(2)(B). The lower courts were never presented with this question because the Department had no reason to impose a penalty, given its conclusion that these plaintiffs did not satisfy the Act's eligibility criteria. The majority opinion sensibly declines to address the penalty issue. Because I see a significant hurdle for plaintiffs whenever this question is addressed, I write separately to explain.

Congress has not defined "for the benefit of [the institutionalized spouse]" in the trust rules. 42 USC 1396p(d)(3). Likewise, Congress has not defined "for the sole benefit of [the community spouse]" in the transfer rules. 42 USC 1396p(c)(2)(B). If words are not defined by statute, we give them their ordinary meaning. The definitions of "sole" and "benefit" are uncontroversial. For example, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines the term "benefit" as "something that promotes well-being" and "useful aid." "Sole" is defined as "having no sharer" and "being the

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program. Maybe. But I'm not as convinced as the majority that the omission was intentional. As the majority observes, "the Medicaid trust rules in 42 USC 1396p(d) were added by OBRA 93, six years before Congress added the SSI trust rules in 42 USC 1382b(e) . . . ." In other words, when Congress enacted 42 USC 1396p(d)(3)(B), it was writing on a clean slate—there was no comparable SSI statute. And Congress has not amended 42 USC 1396p(d)(3)(B) at any time since. But even if Congress intended for the SSI rules to operate differently, or if instead Congress was putting a finer point on what it thought to be the existing Medicaid rule (and should have also amended that rule), I nevertheless agree with the majority that the Act's reference to "the individual" in 42 USC 1396p(d)(3)(B) unambiguously refers to the Medicaid applicant.

only one." *Id*. Other dictionaries agree. And the statutory text gives us another clue: a payment "for the benefit of" an individual must mean something different than a payment "to" an individual, given Congress's use of both connected by "or" in 42 USC 1396p(d)(3)(B) ("to *or* for the benefit of the [institutionalized] individual") and 42 USC 1396p(c)(2)(B)(i) ("to the individual's spouse *or* to another for the sole benefit of the individual's spouse") (emphasis added).

So is a transfer of assets to a third-party trustee "for the sole benefit of" the community spouse if that transfer "benefits" the institutionalized spouse by allowing her to satisfy Medicaid's eligibility limits while avoiding the specific rules that apply to community-spouse annuities? And if the community spouse receives a payment from an SBO trust and then shares that payment with the institutionalized spouse, is that a circumstance in which "payment from the trust" is "made . . . for the benefit of" the institutionalized spouse?[11]

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[11] So thought the United States Court of Appeals for the Third Circuit in *Johnson v Guhl*, 357 F3d 403, 408-409 (CA 3, 2004). *Johnson* concerned the use of so-called "community spouse annuity trusts" (CSATs) in the state of New Jersey. CSATs, like these SBO trusts, were irrevocable and "designed to provide a stream of annuity payments to the community spouse for the duration of his or her life." *Guhl*, 357 F3d at 406. If the trust named the state agency as the first remainder beneficiary, New Jersey would not consider the trust property as a countable asset. *Id*. The state changed its policy after the federal Department of Health and Human Services advised that such trusts should, in fact, be considered countable assets. *Id*. The plaintiffs challenged this interpretation. The Third Circuit agreed with the state:

> As this is a question of statutory interpretation, we begin (and end) our inquiry with the relevant statute, 42 U.S.C. § 1396p(d)(3)(B). That provision provides, in subsection (i), that "[i]n the case of an irrevocable trust—if there are any circumstances under which payment from the trust could be made to or for the benefit of [the institutionalized spouse whose assets are used to establish the trust], the portion of the corpus from which, or the income on the corpus from which, payment to the individual

Even harder: what if an SBO trust names as a remainder beneficiary a person or entity other than the state agency? That is, if a third party can receive the remainder, is the transfer "for the sole benefit of" the community spouse?

The simplest answer might be "yes"—there *are circumstances* under which a distribution from an SBO trust to a community spouse is "for the benefit of" the institutionalized spouse, and there *are persons* other than the community spouse who might "benefit" from a transfer of assets into an irrevocable SBO trust, if that transfer and trust make the institutionalized spouse eligible for benefits. If that's right, then there are circumstances under which a distribution from an SBO trust to a community spouse is "for the benefit of" the institutionalized spouse and the assets held in trust should be considered available resources or income for purposes of determining each plaintiffs' eligibility for Medicaid. And if there are persons other than the community spouse who might "benefit" from a transfer of assets into an irrevocable SBO trust, then the plaintiffs should be subject to a divestment penalty.

But that expansive interpretation—one that defines becoming eligible for Medicaid as a benefit—might

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could be made shall be considered resources available to the individual. . . ." Both parties agree that CSATs are irrevocable trusts. They are generally funded with marital assets (assets that belong to both spouses). Moreover, CSATs are designed so that the corpus and the income on the corpus will provide the community spouse a stream of payments. Once the community spouse receives these payments, there is nothing preventing her or him from sharing them with the institutionalized spouse as well. Section 1396p(d)(3)(B)(i) thus squarely covers CSATs—as "circumstances [exist] under which payment from the trust could be made to or for the benefit of" the institutionalized spouse—and deems them countable resources. Accordingly, we affirm the District Court ruling that plaintiffs' CSAT assets are countable resources. [*Guhl*, 357 F3d at 408-409 (alterations in original).]

prove too much. That understanding would prohibit Medicaid planning strategies that Congress has endorsed. After all, the purchase of a qualified community-spouse annuity "benefits" the institutionalized spouse if the conversion of resources to income allows the institutionalized spouse to satisfy Medicaid's financial eligibility limits without incurring a divestment penalty. See *Morris*, 685 F3d at 935-938. And, of course, the transfer rules themselves permit certain transfers to (d)(4) trusts, which might also benefit the institutionalized spouse in the eligibility determination. See 42 USC 1396p(c)(2)(B)(iii) and (iv).[12]

But the statutory requirement that the transfer be "for the *sole* benefit of" the community spouse is still a hurdle that the plaintiffs must overcome if they are to receive immediate financial assistance. On this point, the statute's plain language, and federal guidance, are instructive.

There are no federal regulations interpreting 42 USC 1396p. The Centers for Medicare & Medicaid Services (CMS),[13] however, has provided guidance on the meaning of "for the sole benefit of" in the State Medicaid Manual, which includes an explanation of the transfer rules:

> For the Sole Benefit of.—A transfer is considered to be for the sole benefit of a spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way *that no individual or entity except the spouse, blind or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.*

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[12] But here too, the transferred assets may be subject to a payback mechanism, because that is a condition of all the (d)(4) trust exceptions. See Part I(B) of this opinion.

[13] At the federal level, the Medicaid program is administered by the Secretary of Health and Human Services, who in turn exercises his authority through CMS.

Similarly, a trust is considered to be established for the sole benefit of a spouse, blind or disabled child, or disabled individual *if the trust benefits no one but that individual, whether at the time the trust is established or any time in the future*. However, the trust may provide for reasonable compensation, as defined by the State, for a trustee or trustees to manage the trust, as well as for reasonable costs associated with investing or otherwise managing the funds or property in the trust. In defining what is reasonable compensation, consider the amount of time and effort involved in managing a trust of the size involved, as well as the prevailing rate of compensation, if any, for managing a trust of similar size and complexity.

A transfer, transfer instrument, or trust that provides for funds or property to pass to a beneficiary who is not the spouse, blind or disabled child, or disabled individual is not considered to be established for the sole benefit of one of these individuals. In order for a transfer or trust to be considered to be for the sole benefit of one of these individuals, the instrument or document must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void.

An exception to this requirement exists for trusts discussed in § 3259.7 [concerning the trust exemption found at 42 USC 1396p(d)(4) for supplemental needs trusts and special-needs trusts]. *Under these exceptions, the trust instrument must provide that any funds remaining in the trust upon the death of the individual must go to the State, up to the amount of Medicaid benefits paid on the individual's behalf.* When these exceptions require that the trust be for the sole benefit of an individual, the restriction discussed in the previous paragraph does not apply when the trust instrument designates the State as the recipient of funds from the trust. Also, the trust may provide for disbursal of funds to other beneficiaries, provided the trust does not permit such disbursals until the State's claim is satisfied. Finally, "pooled" trusts may

provide that the trust can retain a certain percentage of the funds in the trust account upon the death of the beneficiary. [CMS, *State Medicaid Manual*, § 3257(B)(6) (rev 64), p 3-3-109.2 (emphasis added).]

The manual provides the following guidance on the use of irrevocable trusts and the meaning of "to or for the benefit of":

C. Irrevocable Trust — Payments From All or Portion of Trust Cannot, Under Any Circumstances, Be Made to or for the Benefit of the Individual.—When all or a portion of the corpus or income on the corpus of a trust cannot be paid to the individual, treat all or any such portion or income as a transfer of assets for less than fair market value . . . .

* * *

D. Payments Made From Revocable Or Irrevocable Trusts to or on Behalf of Individual.—Payments are considered to be made to the individual when any amount from the trust, including an amount from the corpus or income produced by the corpus, is paid directly to the individual or to someone acting on his/her behalf, e.g., a guardian or legal representative.

Payments made for the benefit of the individual are payments of any sort, including an amount from the corpus or income produced by the corpus, paid to another person or entity such that the individual derives some benefit from the payment. For example, such payments could include purchase of clothing or other items, such as a radio or television, for the individual. Also, such payments could include payment for services the individual may require, or care, whether medical or personal, that the individual may need. Payments to maintain a home are also payments for the benefit of the individual.

* * *

G. Use of Trust vs. Transfer Rules for Assets Placed in Trust.—When a nonexcluded asset is placed in a trust, *a*

> *transfer of assets for less than fair market value generally takes place.* An individual placing an asset in a trust generally gives up ownership of the asset to the trust. If the individual does not receive fair compensation in return, you can impose a penalty under the transfer of assets provisions. [CMS, *State Medicaid Manual*, § 3259.6 (rev 64), pp 3-3-109.28 through 3-3-109.30 (emphasis added).]

The manual does not address the specific interpretation of 42 USC 1396p(d)(3)(B) that the plaintiffs advance,[14] but it offers insight. First, when evaluating whether there is "any circumstance under which payment from the trust could be made to or for the benefit of" the institutionalized spouse, the question is whether the payment is "paid to another person or entity such that the [institutionalized] individual derives some benefit from the payment." CMS, *State Medicaid Manual*, § 3259.6(D), p 3-3-109.29.

The manual is entitled to respectful consideration because this interpretation is entirely consistent with the statutory text and the ordinary meaning of "sole" and "benefit." See *Skidmore v Swift & Co*, 323 US 134, 139-140; 65 S Ct 161; 89 L Ed 124 (1944) (explaining when an administrative policy is entitled to deference). The question, then, is not whether the community spouse is free to share the payment with the institutionalized spouse, but whether the payment itself results in a direct benefit to the institutionalized spouse, such as a purchase of goods or services for the institutionalized spouse. Cf. *Johnson*, 357 F3d at 408-409.

But there's more to do. As the manual explains, "[w]hen a nonexcluded asset is placed in a trust, a transfer of assets for less than fair market value generally takes place." CMS, *State Medicaid Manual*,

[14] See generally CMS, *State Medicaid Manual*, § 3259, pp 3-3-109.24 through 3-3-109.38.

§ 3259.6(G), p 3-3-109.30. That is, the transfer is subject to a divestment penalty. This is because 42 USC 1396p(d)(3)(B)(ii) directs that for "any portion of the trust from which . . . no payment could under any circumstances be made to the [institutionalized] individual," that portion "shall be considered . . . to be assets disposed by the individual for purposes of" the transfer rules.

This point is critical. The plaintiffs believe that the transfer of assets into these SBO trusts is exempt from the divestment penalty because it was a transfer of assets "for the sole benefit of" the plaintiffs' spouses. I am not convinced.

As the manual explains, "[a] transfer, transfer instrument, or trust that provides for funds or property to pass to a beneficiary who is not the spouse . . . is not considered to be established for the sole benefit of [the spouse]." CMS, *State Medicaid Manual*, § 3257(B)(6), p 3-3-109.2. And the relevant period for determining whether the "funds or property . . . pass to a beneficiary who is not the spouse" extends to "any time in the future." *Id*. If there is any person (other than the community spouse) who might stand to benefit from the transfer of assets into an SBO trust, the transfer results in a penalty. This fits with the dictionary definitions, too—if there is another person who might benefit from the transfer, the transfer is not for the "sole" benefit of the community spouse.

In these cases, the plaintiffs' SBO trusts generally reserved in the community spouse a testamentary power of appointment.[15] That is, if any plaintiff's

[15] The Lollar Trust, for example, provided the community spouse with a special testamentary power of appointment for any balance held in trust. See Lollar Trust, Section 3.2. The Hegadorn Trust directed that, if the community spouse predeceased plaintiff Hegadorn, the "Trustee shall

spouse died before all property held in trust could be distributed to him, the remainder would be distributed according to the spouse's will. Thus, when the plaintiffs transferred their assets into these SBO trusts, there was the potential that, at some point in the future, a person other than the community spouses (the yet-to-be-determined remainder beneficiaries) might benefit from the transfer. Therefore, despite their name, these "solely for the benefit of" trusts were not for the sole benefit of the community spouse.[16]

What's more, the plaintiffs' interpretation of the Act makes little sense given the annuity rules and the (d)(4) trusts. Like these SBO trusts, an annuity presents the potential of a remainder beneficiary if the community spouse dies before the annuity's term. But Congress has

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distribute the remaining trust property to the trustee of the *SPECIAL SUPPLEMENTAL CARE TRUST FOR MARY ANN HEGADORN*"; otherwise, any balance would be administered under the terms in the community spouse's will. Hegadorn Trust, Sections 3.2-3.4. The Ford Trust provided the community spouse with a special testamentary power of appointment limited to his heirs; if that power was not fully exercised, the trustee was directed to "divide the remaining Trust property . . . into separate trusts, equal in value, one for each living Child and one for then living Descendants, collectively, of each deceased Child." Ford Trust, Section 3.2.

The payment terms of the trusts are less clear; while all the trusts require the trustee to make distributions on an "actuarially sound" basis, the trustee is not prohibited from distributing all of the trust property nearly immediately, in a lump-sum payment, contrary to the requirements placed on annuities. See Lollar Trust, Section 2.2; Hegadorn Trust, Section 2.2; Ford Trust, Section 2.2.

[16] The possibility of a remainder beneficiary is always present in a trust, either as provided for in the trust instrument or by operation of law. If the plaintiffs' SBO trusts did not include a residuary clause, any property held in an SBO trust would revert to the settlor (or the settlor's heirs) upon the death of the community spouse. MCL 555.18. Perhaps, then, the transfer of assets into an SBO trust should *always* result in the imposition of a divestment penalty.

written specific affirmative rules permitting the use of community-spouse annuities as a valid Medicaid planning strategy—so long as the annuity is actuarially sound and the state agency is named as a remainder beneficiary.[17] And the remainder-beneficiary rule for annuities shows that Congress did not intend to create an easy alternative with all the advantages and none of the disadvantages. See, e.g., *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 232; 683 NW2d 639 (2004) ("[A] statutory term cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme."). Likewise, where Congress has permitted transfers to certain (d)(4) trusts free from penalty, see 42 USC 1396p(c)(2)(B)(iii) and (iv), Congress has explicitly required a payback mechanism in the recipient trust. See note 7 of this opinion.

E. THE MEDICAID ACT AS A WHOLE

As the Supreme Court explained in *Blumer*, "[e]ach participating State develops a plan containing reasonable standards for determining eligibility for and the extent of medical assistance within boundaries set by the Medicaid statute and the Secretary of Health and Human Services." *Blumer*, 534 US at 479 (cleaned up). And those standards must "comply with the provisions

[17] The only circumstance in which a third party might stand to "benefit" from a qualified community-spouse annuity is if that party is named as a second (or later) remainder beneficiary and the state agency is fully paid back for all financial assistance provided to the institutionalized spouse. But the annuity must also be irrevocable, actuarially sound, and paid out in substantially equal monthly payments; otherwise, the transfer will be penalized. See Part I(B) of this opinion. A community-spouse annuity is thus an unreliable strategy for passing wealth to others, to say the least, as it requires the premature death of the community spouse.

of [42 USC 1396p] . . . ." 42 USC 1396a(a)(18). If the plaintiffs' interpretation of the Act is correct, SBO trusts would be available as a Medicaid planning strategy in every state that has elected to cover the medically needy. Yet no other jurisdiction has endorsed the legality of this type of Medicaid planning. Rather, the only appellate court to have even considered such a theory rejected it, albeit on other grounds. *Johnson*, 357 F3d at 408-409.

If the plaintiffs were successful in avoiding the divestment penalty, their planning strategy would make meaningless the complex set of rules governing Medicaid eligibility. Consider, for example, an irrevocable trust that is funded with marital assets after the look-back date. The hypothetical trust provides that the third-party trustee must not make any distribution to the community spouse until after the Department has made a determination on the institutionalized spouse's eligibility (which must be made within 45 days from the date of application, see 42 CFR 435.912). The hypothetical trust further provides that, once an eligibility determination has been made, the trustee must immediately distribute all property to the community spouse. See 42 USC 1396p(d)(2)(C)(ii) and (iii) (providing that the trust rules "shall apply without regard to . . . whether the trustees have or exercise any discretion under the trust [or] any restrictions on when or whether distributions may be made from the trust . . . ."). Such a trust would serve as a vehicle through which assets could be placed during the application, and then passed directly to the community spouse once an eligibility determination is made.

The plaintiffs argue that this transfer would not trigger a divestment penalty, because it would be for "for the sole benefit of" the community spouse. And

there is no dispute that the distribution of assets to the community spouse would not be imputed to the institutionalized spouse; that part is settled. See 42 USC 1396r-5(b)(2) and (c)(4); *Blumer*, 534 US at 480-481. Thus, the value of the assets placed in the trust would be sheltered from the initial resource evaluation, and the distribution would not affect the institutionalized spouse's continued eligibility, nor would it change the level of financial assistance provided by the Department. The only practical restriction is that the trust property would be inaccessible to the community spouse for the period it would take the Department to process the application. Aside from that minor inconvenience, a married applicant can evade virtually every restriction that Congress has placed on Medicaid financial assistance. There would be no limitation on the amount of assets that a Medicaid applicant could transfer penalty-free to her spouse, virtually immediately, not subject to the repayment requirements for (d)(4) trusts and trust-like devices such as annuities, and shielded from Medicaid's initial resource assessment. That result is inconsistent with the statute, especially given that Congress has already enacted complex rules that "shelter[] from diminution a standard amount of assets" (the CSRA). *Blumer*, 534 US at 478; see also *Breighner*, 471 Mich at 232. But our determination requires us to consider the entire text, not isolated parts lifted out of context. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167 ("Perhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

II. CONCLUSION

In the Medicaid Act, Congress has balanced two competing policies: "protect[ing] community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." *Blumer*, 534 US at 480. These policies are well reflected in the (admittedly complex) statutory scheme. I agree with the majority that "the individual" in 42 USC 1396p(d)(3)(B) refers to the Medicaid applicant. But if the plaintiffs' transfers trigger the divestment penalty, it is not likely they will view this planning strategy as a success. The majority is correct to leave this question for a case in which it has been presented by the parties. I address it here only to caution individuals who might consider forming *irrevocable* trusts in an effort to achieve Medicaid eligibility, especially when other planning strategies are available, permission for which is well settled.

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

KENDZIERSKI v MACOMB COUNTY

Docket No. 156086. Argued on application for leave to appeal November 19, 2018. Decided May 30, 2019.

Rita Kendzierski and others filed a class action in the Macomb Circuit Court against Macomb County, seeking injunctive relief and monetary damages after defendant made changes to retiree healthcare benefits; plaintiffs were retired unionized county employees who had worked for defendant under various collective-bargaining agreements (CBAs) dating back to 1989. Each CBA provided, in materially similar terms, that defendant would provide retirees with specific medical coverage if certain conditions were met and that (1) medical coverage would cease upon the retiree's death or continue for the retiree's spouse after the retiree's death if the retiree had made a spousal election (the surviving-spouse provision), (2) retirees had to enroll in Medicare upon reaching 65 years of age (the supplemental-care provision), and (3) coverage would be temporarily suspended if a retiree became gainfully employed (the subsequent-employment provision). Each CBA also contained a general three-year durational clause—that is, each CBA was in effect for a three-year term. In 2009 and 2010, when the 2008–2010 CBAs were in effect, defendant unilaterally altered plaintiffs' healthcare benefits; plaintiffs claimed that the changes increased the cost of prescription copays, changed deductible amounts, and reduced plan options. The parties filed competing motions for summary disposition regarding whether defendant's changes to the healthcare benefits were allowed under the CBAs, and plaintiffs also requested a permanent injunction enjoining further changes and requiring defendant to return the benefits to the *status quo ante*. The court, Diane M. Druzinski, J., granted defendant's motion in part, concluding that while plaintiffs were entitled to lifetime healthcare benefits under the agreements, defendant could make reasonable modifications to those benefits. The Court of Appeals (FORT HOOD, P.J., and JANSEN and HOEKSTRA, JJ.) affirmed in part and reversed in part, concluding that plaintiffs were entitled to lifetime healthcare benefits but that those benefits could not be modified without plaintiffs' consent. 319 Mich App 278 (2017).

The Supreme Court ordered and heard oral argument on whether to grant the city's application for leave to appeal or take other action. 501 Mich 966 (2018).

In an opinion by Justice MARKMAN, joined by Justices ZAHRA, VIVIANO, and CLEMENT, the Supreme Court *held*:

Because the provisions related to retiree healthcare benefits were not ambiguous, extrinsic evidence should not have been reviewed to interpret the CBAs' terms. While a CBA may provide that certain benefits continue after the agreement's expiration, when a contract is silent regarding the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life. The CBAs at issue here contained a general three-year durational clause, and no provision specified that the disputed benefits were subject to a different duration. Accordingly, the CBAs did not grant plaintiffs a vested right to lifetime and unalterable healthcare benefits, and the promise of retirement healthcare benefits expired at the end of the three-year terms of those agreements.

1. When interpreting a contract, the goal is to give effect to the intent of the parties as determined by the plain and unambiguous language of the contract itself. Unambiguous contract language must be interpreted and enforced as written because an unambiguous contract reflects the parties' intent as a matter of law. However, extrinsic evidence may be submitted to determine the intent of the parties if the contract language is ambiguous. A patent ambiguity arises from the face of the document. A contractual term is ambiguous on its face if the term is equally susceptible to more than a single meaning. A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning but other facts create the necessity for interpretation of a choice among two or more possible meanings. Courts may not create ambiguity when the terms of a contract are clear, and courts cannot ignore portions of a contract to declare an ambiguity. The rule of reasonable expectations, which involves determining what the parties reasonably expected when forming a contract, does not apply when interpreting an unambiguous contract because a policyholder cannot be said to have reasonably expected something different from the clear language of the contract. In this case, the Court of Appeals erred when it referred to the purported ambiguity in the contractual language as a "latent" ambiguity; moreover, the Court of Appeals erred by finding any ambiguity.

2. A CBA is interpreted under principles of contract law, and it is presumed that the written agreement encompasses the whole

agreement of the parties. Absent a contrary intent, contractual obligations therefore end when the bargaining agreement terminates. When a contract is silent regarding the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life. Under *M&G Polymers USA, LLC v Tackett*, 574 US 427 (2015), there is also no presumption of vesting based on provisions that: (a) tie eligibility for retirement health benefits to eligibility for a pension, (b) enable continuation of a surviving spouse's healthcare coverage following the death of the retiree, and (c) specify that the employer will pay a retiree's insurance once he or she reaches age 65 when employees could retire at age 55. Accordingly, courts may not infer that the parties likely intended benefits that accrue upon achievement of retiree status to continue as long as the beneficiary remains a retiree; under *CNH Indus NV v Reese*, 583 US ___ (2018), those inferences may not be used to render a CBA ambiguous because such inferences are inconsistent with the ordinary principles of contract law.

3. In this case, none of the CBAs specified that defendant agreed to provide lifetime and unalterable healthcare benefits; if the parties had intended such an outcome, they could have expressed that intent in the agreements, but they did not. The general durational clauses in the CBAs controlled because the CBAs did not specify an alternative ending date for healthcare benefits. In that regard, because the CBAs each contained a three-year durational provision, each CBA guaranteed benefits only until the agreement expired. Moreover, given the provisions indicating that each CBA contained all agreements, express or implied, the most reasonable interpretation was that the contractual right to retiree healthcare benefits expired when the relevant CBA expired. Contrary to the dissent's argument, the CBAs did not contain a patent ambiguity. The surviving-spouse, supplemental-care, and subsequent-employment provisions did not render the CBAs ambiguous because each of the events addressed in these provisions could occur during the three-year duration of the CBAs. That each of the events could also have occurred beyond the CBAs' durational terms did not support the conclusion that the parties intended coverage to extend in perpetuity. Specifically, the surviving-spouse provision governed the eligibility of the spouse when the retiree died; it did not determine the duration of the retiree's or spouse's benefits. In that way, the surviving-spouse provision did not evidence an intention that the benefits would continue beyond the three-year term specified by the general durational clause. The supplemental-care provision did not guarantee benefits for the duration of the agreement but,

instead, conditioned continued benefits on enrollment in Medicare if a retiree reached the age of 65 when the CBA was in effect. The subsequent-employment provision also did not create an ambiguity as to whether the parties intended that retiree benefits would vest; the provision did not necessarily imply that retirees would receive healthcare benefits beyond the three-year durational term because a retiree might alternatively obtain coverage through another employer before the three-year term of the CBA expired. Taken as a whole, the clauses did not reasonably and clearly indicate that the retiree benefits were to continue past the duration of the CBAs. Contrary to the dissent's conclusion, the agreements did not contain provisions that tied benefits to events that could only occur or would almost certainly not occur until after the CBAs expired. Accordingly, the Court of Appeals erred by concluding that although the CBAs did not contain language explicitly promising indefinite benefits, other contract language (the surviving-spouse, supplemental-care, and subsequent-employment provisions) created an ambiguity regarding whether the healthcare benefits were vested. Because the CBAs were not ambiguous with regard to the duration of retiree healthcare benefits, the Court of Appeals erred by concluding that the trial court properly examined extrinsic evidence to determine whether retirees were entitled to lifetime benefits.

Reversed and remanded to the trial court for entry of an order granting summary disposition to defendant.

Chief Justice MCCORMACK, joined by Justice BERNSTEIN, dissenting, agreed with the majority's understanding of the recent federal caselaw but disagreed with the majority's conclusion that the CBAs were unambiguous. When a contract lacks explicit terms on the duration of retiree benefits, implied terms or industry practice may show that the parties intended those benefits to extend beyond the contract's general durational period. For example, ambiguity can arise when a CBA links eligibility for a particular right to an event that would almost certainly occur after the expiration of the agreement. In this case, the surviving-spouse, supplemental-care, and subsequent-employment provisions implied that defendant and the unions intended retiree healthcare benefits to last for those retirees' entire retirements; that is, for their lives. Although those provisions did not irreconcilably conflict with the three-year durational clause, for most employees who retired during a CBA's three-year term, the triggering events were almost certain to occur beyond the expiration of that term. These specific provisions, the nature of the benefits, and the lack of a provision tying the benefits to the

general durational clause (unlike in *Reese*) created ambiguity because the CBAs were equally susceptible to being read as promising retirement healthcare for retirement. Because Justice MCCORMACK concluded that the CBAs were ambiguous about whether defendant promised retiree healthcare benefits for more than the three-year term, she would have remanded the case to the trial court for the fact-finder to determine the duration issue after considering any extrinsic evidence introduced by the parties.

Justice CAVANAGH did not participate in the disposition of this case because the Court considered it before she assumed office.

1. CONTRACTS — COLLECTIVE-BARGAINING AGREEMENTS — DURATIONAL CLAUSES — VESTING OF RETIREE HEALTHCARE BENEFITS.

Collective-bargaining agreements are interpreted under principles of contract law, and it is presumed that the written agreement encompasses the whole agreement of the parties; when a contract is silent regarding the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life; absent the expression of a contrary intent, a promise of retirement healthcare benefits expires when the bargaining agreement expires.

2. CONTRACTS — COLLECTIVE-BARGAINING AGREEMENTS — RETIREE HEALTHCARE BENEFITS — VESTING — NO INFERENCE OF VESTING — INFERENCES MAY NOT BE USED TO RENDER THE AGREEMENT AMBIGUOUS.

With regard to collective-bargaining agreements, there is no presumption of vesting based on provisions that: (a) tie eligibility for retirement health benefits to eligibility for a pension, (b) enable continuation of a surviving-spouse's healthcare coverage following the death of the retiree, and (c) specify that the employer will pay a retiree's insurance once he or she reaches age 65 when employees could retire at age 55; courts may not infer that parties likely intended benefits that accrue upon achievement of retiree status to continue as long as the beneficiary remains a retiree; such inferences may also not be used to render a collective-bargaining agreement ambiguous because the inferences are inconsistent with the ordinary principles of contract law applied by Michigan courts.

Legghio & Israel, PC (by *Christopher P. Legghio* and *Stuart M. Israel*) for plaintiffs.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Susan Healy Zitterman* and *Karen B. Berkery*) for defendant.

Amici Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Clifford W. Taylor*, *Richard W. Warren*, and *Brian M. Schwartz*) for the Michigan Municipal League, the Michigan Association of Counties, the Michigan Townships Association, and the Public Corporation Law Section of the State Bar of Michigan.

Kenneth J. Bailey, *Teague P. Paterson*, and *Dawn E. H. Lee* for the American Federation of State, County, and Municipal Employees, AFL-CIO.

Mark H. Cousens Law Office (by *Mark H. Cousens*) for the American Federation of Teachers Michigan, AFL-CIO.

MARKMAN, J. The issue here is whether plaintiffs' collective-bargaining agreements (CBAs) with defendant, Macomb County, granted plaintiffs a vested right to lifetime and unalterable retirement healthcare benefits. The trial court held that while plaintiffs are entitled to lifetime healthcare benefits, defendant can make reasonable modifications to those benefits. On appeal, the Court of Appeals held that plaintiffs are entitled to lifetime and unalterable healthcare benefits and that such benefits cannot be modified absent plaintiffs' consent. Because we conclude that the CBAs did not grant plaintiffs a vested right to lifetime and unalterable benefits, we reverse the judgment of the Court of Appeals and remand to the Macomb Circuit Court for entry of an order granting summary disposition to defendant consistent with this opinion.

I. BACKGROUND

This is a class action brought on behalf of approximately 1600 unionized Macomb County employee retirees who worked for defendant under various CBAs dating back to 1989. Plaintiffs claim that in 2009 and 2010 defendant breached these agreements by reducing and altering their healthcare benefits; plaintiffs now seek both monetary damages and injunctive relief. It is undisputed that each CBA contained an express three-year durational provision and that none of the CBAs contained a provision expressly granting a vested right to lifetime and unalterable retirement healthcare benefits. The trial court granted defendant's motion for summary disposition, concluding that while plaintiffs are entitled to lifetime healthcare benefits under the agreements, defendant is permitted to make reasonable modifications to those benefits. The Court of Appeals affirmed in part and reversed in part, concluding that while plaintiffs are entitled to lifetime healthcare benefits, those benefits cannot be modified absent plaintiffs' consent. *Kendzierski v Macomb Co*, 319 Mich App 278, 286-289; 901 NW2d 111 (2017). We ordered and heard oral argument on whether to grant defendant's application for leave to appeal. *Kendzierski v Macomb Co*, 501 Mich 966 (2018).

II. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 398; 919 NW2d 20 (2018). "This Court also reviews de novo questions of . . . the proper interpretation of a contract." *Id*.

III. ANALYSIS

It is undisputed that all of the CBAs contain the following provisions or provisions that are "materially similar":[1]

> Retirees: The Employer will provide fully paid Blue Cross/Blue Shield Hospital-Medical coverage to the employee and the employee's spouse, after eight (8) years of service with the Employer, for the employee who leaves employment because of retirement and is eligible for and receives benefits under the Macomb County Employees' Retirement Ordinance . . . .
>
> * * *
>
> Coverage shall be limited to the current spouse of the retiree, at the time of retirement, provided such employee shall retire on or after January 1, 1974. Coverage for the eligible spouse will terminate upon the death of the retiree unless the retiree elects to exercise a retirement option whereby the eligible current spouse receives applicable retirement benefits following the death of the retiree.
>
> Coverage shall be limited to Blue Cross/Blue Shield MVF1 Master Medical with ML Rider, or its substantial equivalence.
>
> * * *
>
> Retired employees and/or their current spouse, upon reaching age 65, shall apply if eligible, and participate in the Medicare Program at their expense as required by the Federal Insurance Contribution Act, a part of the Social Security Program, at which time the Employer's obligation shall be only to provide "over 65 supplemental" hospital-medical benefit coverage. Failure to participate

[1] At oral argument before this Court, defense counsel indicated that all of the pertinent CBAs contain "similar provisions" and that there is no "dispute as to the nature of the provisions in this case"; plaintiffs' counsel also stated that the CBAs are "materially similar."

> in the aforementioned Medicare Program, shall be cause for termination of Employer paid coverage of applicable hospital-medical benefits, as outlined herein for employees who retire and/or their current spouse.
>
> Employees who retire under the provisions of the Macomb County Employees' Retirement Ordinance, and/or their current spouse, who subsequently are gainfully employed, shall not be eligible for hospital-medical benefits, during such period of gainful employment . . . .
>
> * * *
>
> The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to all subjects of collective bargaining and that all agreements and understandings, expressed, implied, written or oral, are set forth in this Agreement. This Agreement expresses the complete understanding of the Parties on the subject of wages, working conditions, hours of work, benefits and conditions of employment.
>
> * * *
>
> This Agreement shall continue in full force and effect until December 31, 2007. [Paragraph lettering omitted.]

The issue is whether the CBAs granted plaintiffs vested rights to lifetime and unalterable retirement healthcare benefits. In *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America (UAW) v Yard-Man, Inc*, 716 F2d 1476, 1478 (CA 6, 1983), the United States Court of Appeals for the Sixth Circuit held that the CBAs at issue in that case granted the plaintiffs vested rights to lifetime and unalterable retirement healthcare benefits. However, as recognized by *Arbuckle v Gen Motors LLC*, 499 Mich 521; 885 NW2d 232 (2016), the United States Supreme Court in *M&G Polymers USA, LLC v*

Tackett, 574 US 427; 135 S Ct 926; 190 L Ed 2d 809 (2015), overruled *Yard-Man* (and its progeny) in an opinion that

> characterized [*Yard-Man* and its progeny] as "placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." Those decisions, the Supreme Court explained, "distort the text of [a collective-bargaining] agreement and conflict with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." Indeed, basic principles of contract interpretation instruct that "courts should not construe ambiguous writings to create lifetime promises" and, absent a contrary intent, that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." For "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." [*Arbuckle*, 499 Mich at 540, quoting *Tackett*, 574 US at 438-443 (quotation marks omitted; second alteration in *Arbuckle*).][2]

Tackett specifically rejected many of the same arguments raised by plaintiffs in the instant case. For example, *Tackett* rejected *Yard-Man*'s presumption that a general durational clause, which specifies when a contract will expire, states nothing about the vesting of retiree benefits.[3] *Tackett*, 574 US at 440.

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[2] In *Arbuckle*, 499 Mich at 525, this Court, applying federal law, held that the defendant was allowed to "coordinate plaintiff's disability pension benefits because the parties' collective-bargaining agreements and the subsequent modifications thereto did not vest plaintiff's right to uncoordinated benefits." That is, pursuant to express durational clauses within the agreements, we held that provisions that prohibited coordination of benefits terminated when the agreements expired. *Id*. at 541-543.

[3] *Yard-Man*, 716 F2d at 1482-1483, held that given that a general durational clause does not specifically pertain to the duration of retiree benefits, it is outweighed by other considerations. Subsequently, *Noe v PolyOne Corp*, 520 F3d 548, 555 (CA 6, 2008), abrogated by *Tackett*, 574

It also rejected the presumption of vesting based on provisions that: (a) tie eligibility for retirement health benefits to eligibility for a pension, (b) enable continuation of a surviving spouse's healthcare coverage following the death of the retiree, and (c) specify that the employer will pay a retiree's insurance once he or she reaches age 65 when employees could retire at age 55.[4] *Id*. at 441-442.

Yard-Man, 716 F2d at 1482, held that "if [employees] forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits"; "[a]s such, it is unlikely that such benefits . . . would be left to the contingencies of future negotiations." It further held that "when . . . parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." *Id*. *Tackett*, 574 US at 438-439, 442, rejected these inferences as "inconsistent with ordinary principles of contract law," explaining that "*Yard-Man*'s assessment of likely behavior in collective bargaining is too speculative and too far removed from the context of any particular contract to be useful in discerning the parties' intention" and that the *Yard-Man* Court "derived its assessment of likely behavior not from record evidence, but instead from its own suppositions about the intentions of employees, unions, and employers negotiating re-

US 427, held that "[a]bsent specific durational language referring to retiree benefits themselves, a general durational clause says nothing about the vesting of retiree benefits." (Quotation marks and citation omitted; alteration in *Noe*.)

[4] *Tackett* also rejected the argument that retiree healthcare benefits constitute a form of "deferred compensation." *Tackett*, 574 US at 439-440.

tiree benefits." Furthermore, *Tackett* held that *Yard-Man* failed to recognize the traditional principle that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement"[5] and that while "a collective-bargaining agreement may provide in explicit terms that certain benefits continue after the agreement's expiration[,] . . . when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Id*. at 441-442 (quotation marks, citation, and brackets omitted).

Post-*Tackett*, "the Sixth Circuit [in *Reese v CNH Indus NV*, 854 F3d 877, 882-883 (CA 6, 2017),] held that the same *Yard-Man* inferences it once used to presume lifetime vesting can now be used to render a collective-bargaining agreement ambiguous as a matter of law, thus allowing courts to consult extrinsic evidence about lifetime vesting." *CNH Indus NV v Reese*, 583 US ___, ___; 138 S Ct 761, 763; 200 L Ed 2d 1 (2018). The United States Supreme Court characterized this new analysis as "*Yard-Man* re-born, rebuilt, and re-purposed for new adventures" and again reversed. *Id*. at ___; 138 S Ct at 763 (quotation marks and citation omitted). It held that the *Yard-Man* inferences could not be used to render a CBA ambiguous. *Id*. at ___; 138 S Ct at 763. Finally, the Supreme Court held that the CBA at issue was unambiguous and that it did not create lifetime healthcare benefits for retirees. *Id*. at ___; 138 S Ct at 766. It observed:

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[5] See *Litton Fin Printing Div v Nat'l Labor Relations Bd*, 501 US 190, 206; 111 S Ct 2215; 115 L Ed 2d 177 (1991) ("[A]n expired contract has by its own terms released all its parties from their respective contractual obligations . . . .").

> Tellingly, no other Court of Appeals would find ambiguity in these circumstances. When a collective-bargaining agreement is merely silent on the question of vesting, other courts would conclude that it does *not* vest benefits for life. Similarly, when an agreement does not specify a duration for health care benefits in particular, other courts would simply apply the general durational clause. And other courts would not find ambiguity from the tying of retiree benefits to pensioner status. . . .
>
> Shorn of *Yard-Man* inferences, this case is straightforward. The 1998 agreement contained a general durational clause that applied to all benefits, unless the agreement specified otherwise. No provision specified that the health care benefits were subject to a different durational clause. . . . If the parties meant to vest health care benefits for life, they easily could have said so in the text. But they did not. And they specified that their agreement "dispose[d] of any and all bargaining issues" between them. Thus, the only reasonable interpretation of the 1998 agreement is that the health care benefits expired when the collective-bargaining agreement expired in May 2004. "When the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court's inquiry should proceed no further." [*Id*. at ___; 138 S Ct at 766 (citations omitted; alteration in *Reese*).][6]

The Court of Appeals in the instant case did exactly what the Sixth Circuit did in *Reese*, i.e., it relied on the *Yard-Man* inferences to find the CBAs ambiguous and then resorted to extrinsic evidence to find in favor of

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[6] In *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Kelsey-Hayes Co*, 854 F3d 862, 868-871 (CA 6, 2017), the Sixth Circuit held that the CBA at issue in that case was also "ambiguous" regarding retiree healthcare benefits and that the extrinsic evidence indicated that the parties intended the CBA to provide lifetime healthcare benefits. However, the United States Supreme Court vacated the Sixth Circuit's decision and remanded the case for reconsideration in light of its decision in *Reese*. *Kelsey-Hayes Co v Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America*, 583 US ___; 138 S Ct 1166; 200 L Ed 2d 313 (2018).

lifetime healthcare benefits.[7] Although this Court is not bound to follow the United States Supreme Court's

[7] The dissent distinguishes *Tackett* on the ground that *Tackett* "did not address whether there was ambiguity in the parties' CBA . . . ." However, *Reese*, 583 US at ___; 138 S Ct at 763, expressly held that "the same *Yard-Man* inferences . . . once used to presume lifetime vesting [until rejected by *Tackett* cannot] now be used to render a collective-bargaining agreement ambiguous . . . about lifetime vesting." That is, *Reese* very clearly held that the reasoning in *Tackett* applies equally when the question is whether a CBA is ambiguous about lifetime vesting. The dissent also asserts that *Reese* is distinguishable because the "CBA [in *Reese*] differed from those here in one important respect that mattered to the Court's analysis: it included language that specifically tied the promise of retiree healthcare to the agreement's general durational clause." We respectfully disagree. In *Reese*, a group benefit plan was incorporated into the CBA by language providing that the group benefit plan " 'will run concurrently with this Agreement and is hereby made a part of this Agreement.' " *Reese v CNH Indus NV*, 854 F3d 877, 889 (CA 6, 2017) (emphasis omitted), rev'd 583 US ___. Because the group benefit plan was a separate agreement from the CBA, this language was necessary to incorporate the group benefit plan into the CBA and to indicate that it would be subject to the same durational provision of the CBA. Furthermore, although *Reese* referred to this provision, it was by no means viewed by the Court as dispositive as evidenced by its single reference to this language in its analysis (as compared to the dissent's five references to such language or the lack of such language in its analysis). Instead, *Reese* held that the CBA "contained a general durational clause that applied to all benefits, unless the agreement specified otherwise," which it did not. *Reese*, 583 US at ___; 138 S Ct at 766. As both *Tackett* and *Reese* held, " 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.' " *Id*. at ___; 138 S Ct at 763, quoting *Tackett*, 574 US at 441-442 (quotation marks and citation omitted). Accordingly, "when an agreement does not specify a duration for health care benefits in particular, . . . courts [should] simply apply the general durational clause." *Reese*, 583 US at ___; 138 S Ct at 766. This is true regardless of whether there is a provision specifically tying the contractual obligation to the general durational clause because "[a]bsent a longer time limit in the context of a specific provision, the general durational clause supplies a final phrase to *every* term in the CBA: 'until this agreement ends.' " *Gallo v Moen Inc*, 813 F3d 265, 269 (CA 6, 2016), cert den 580 US ___ (2016) (emphasis added). See also *Cooper v Honeywell Int'l, Inc*, 884 F3d 612, 618 (CA 6, 2018) ("[A] general durational clause should be 'applied to *all* benefits,

opinion in *Reese*, we choose to follow it because it is fully consistent with Michigan's own principles of contract law.[8]

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unless the agreement specified otherwise.' ") (emphasis added), quoting *Reese*, 583 US at ___; 138 S Ct at 766; *Cole v Meritor, Inc*, 855 F3d 695, 701 (CA 6, 2017) (" 'In the absence of specific language in the retiree healthcare provisions, the general durational clause controls.' "), quoting *Gallo*, 813 F3d at 272.

Indeed, *Tackett*, 574 US at 440, criticized Sixth Circuit decisions that, as with the dissent here, "refused to apply general durational clauses to provisions governing retiree benefits" and instead "requir[ed] a contract to include a specific durational clause for retiree health care benefits to prevent vesting," i.e., to counter the inference that "retiree benefits generally last as long as the recipient remains a retiree . . . ." Similarly, the dissent here chooses not to apply general durational clauses to provisions governing retiree benefits and instead would obligate the CBAs to include affirmative "language *explicitly* linking the providing of retiree healthcare benefits to the CBA's durational clause" in order to prevent vesting, i.e., in order to counter the inference that "*retirement* healthcare was a promise that they would have healthcare for the period of their *retirement*." The Sixth Circuit in *Yard-Man*, 716 F2d at 1482, relied on that same inference: "when . . . parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree," and *Tackett* rejected this reasoning. As *Tackett* explained, such an analysis "distort[s] the text of the agreement and conflict[s] with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Tackett*, 574 US at 440.

[8] The parties do not dispute that, unlike in *Arbuckle*, 499 Mich at 532-536, state law controls here, presumably because while *Arbuckle* involved the interpretation of CBAs with a private employer, the instant case involves the interpretation of CBAs with a public employer, i.e., a political subdivision of the state. See 29 USC 185(a) (providing that "[s]uits for violation of contracts between an employer and a labor organization" may be brought in federal court); 29 USC 152(2) (excluding from the definition of "employer" in 29 USC 185(a) "any State or political subdivision thereof"); *Jackson Transit Auth v Local Div 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 US 15, 23; 102 S Ct 2202; 72 L Ed 2d 639 (1982) ("[L]abor relations between local governments and their employees are the subject of a longstanding statutory exemption from the National Labor Relations Act.").

"Our goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself." *Wyandotte Electric Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 143-144; 881 NW2d 95 (2016). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law." *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). "However, if the contractual language is ambiguous, extrinsic evidence can be presented to determine the intent of the parties." *Id*.

"A contractual term is ambiguous on its face only if it is equally susceptible to more than a single meaning." *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich 32, 40; 892 NW2d 794 (2017). In addition, "if two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003).[9] However, "ambiguity is a finding of last resort . . . ." *Mayor of the City of Lansing v Pub Serv Comm*, 470 Mich 154, 165 n 6; 680 NW2d 840 (2004). That is, "a finding of ambiguity is to be reached only after all other conventional means of interpretation have been applied and found wanting." *Id*. at 165 (quotation marks, citation, and brackets omitted). "[W]e will not create ambiguity where the terms of the contract are clear." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

[9] See *Mayor of the City of Lansing v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) ("[A] provision of the law is ambiguous only if it irreconcilably conflicts with another provision or when it is *equally* susceptible to more than a single meaning.") (quotation marks, citation, and brackets omitted).

"[C]ourts cannot simply ignore portions of a contract . . . in order to declare an ambiguity." *Klapp*, 468 Mich at 467.

"A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). "Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract." *Id*. "The general rule of contracts is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in courts." *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002) (quotation marks, citation, and brackets omitted). "When a court abrogates unambiguous contractual provisions based on its own independent assessment of 'reasonableness,' the court undermines the parties' freedom of contract." *Rory*, 473 Mich at 468-469. "This approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). "[T]he rule of reasonable expectations clearly has no application when interpreting an unambiguous contract because a policyholder cannot be said to have reasonably expected something different from the clear language of the contract." *Id*. at 62.[10]

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[10] The dissent appears to be relying on the rule of reasonable expectations to discern an ambiguity in the CBAs when it states in several

These contract principles apply to CBAs just as they do with regard to any other contract. As this Court has explained:

> The foundational principle of our contract jurisprudence is that parties must be able to rely on their agreements. This principle applies no less strongly to collective bargaining agreements: when parties to a collective bargaining agreement bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules—a new code of conduct for themselves—on that subject. A party to the collective bargaining agreement has a right to rely on the agreement as the statement of its obligations on any topic covered by the agreement. [*Macomb Co v AFSCME Council 25*, 494 Mich 65, 80; 833 NW2d 225 (2013) (quotation marks and citations omitted).]

In *Harper Woods Retirees Ass'n v City of Harper Woods*, 312 Mich App 500, 512-513; 879 NW2d 897 (2015), the Court of Appeals "conclude[d] that the [United States] Supreme Court's reasoning in *Tackett* is consistent with Michigan's contract jurisprudence regarding CBAs, which applies with equal force in both the public and private sectors." The Court of Appeals rejected the plaintiffs' argument that "their right to the specific healthcare benefits included in their CBAs and contracts continued indefinitely after retirement, regardless of whether the explicit terms of the contracts indicated that the parties intended those benefits to continue after the agreements expired." *Id*. at 511. Instead, "the language governing retiree healthcare

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places that plaintiffs "believe[d]," "underst[ood]," and "thought" that they would have healthcare benefits for the rest of their lives. However, what plaintiffs believed, understood, and thought about their healthcare benefits is only relevant to the extent that it is supported by the actual language of the pertinent CBAs. *Wilkie*, 469 Mich at 60 ("[O]ne's alleged 'reasonable expectations' cannot supersede the clear language of a contract.").

benefits [must] indicate[] that the parties intended the same benefits to continue after expiration of the agreements . . . ." *Id*. at 513. If the language does not so indicate, "the benefits terminated after expiration of the agreements, so that defendant was permitted to alter the benefits under future contracts." *Id*.

Post-*Tackett*, the Sixth Circuit addressed this same issue in *Gallo v Moen Inc*, 813 F3d 265 (CA 6, 2016), cert den 580 US ___ (2016), and concluded that the CBAs did not provide lifetime and unalterable healthcare benefits to retirees and dependents.[11] The court observed:

> *First and foremost*, nothing in this or any of the other CBAs says that Moen committed to provide unalterable healthcare benefits to retirees and their spouses for life. That is what matters, and that is where the plaintiffs fall short. *Tackett* directs us to apply ordinary contract principles and not to tilt the inquiry in favor of vesting—a frame of reference that prompts two questions. What is the contract right that the plaintiffs seek to vindicate? And does the contract contain that right? The plaintiffs claim a right to healthcare benefits for life. But the contracts never make that commitment. Yes, Moen offered retirees healthcare benefits. And yes Moen, like many employers, may have wished that business conditions and stable healthcare costs (hope springs eternal) would permit it to provide similar healthcare benefits to retirees throughout retirement. But the question is whether the two parties signed a contract to that effect. Nothing of the sort appears in the collective bargaining agreements.
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> *Second*, not only do the CBAs fail to say that Moen committed to provide unalterable healthcare benefits for life to retirees, everything they say about the topic was contained in a *three-year* agreement. If we do not expect to find "elephants in mouseholes" in construing statutes, we should not expect to find lifetime commitments in time-

[11] This Court approvingly cited *Gallo* in *Arbuckle*, 499 Mich at 540 n 56.

> limited agreements. Each of the CBAs made commitments for approximately three-year terms—well short of commitments for life. Present in each CBA, the general durational clause supplied a concrete date of expiration after which either party could terminate the agreement. When a specific provision of the CBA does not include an end date, we refer to the general durational clause to determine that provision's termination. Absent a longer time limit in the context of a specific provision, the general durational clause supplies a final phrase to every term in the CBA: "until this agreement ends." Reading the healthcare provisions in conjunction with the general durational clause gives meaning to the phrases "[c]ontinued," "will be provided," "will be covered," and the like. These terms *guarantee* benefits until the agreement expires, nothing more. [*Id*. at 269 (citations omitted).]

The *Gallo* analysis applies equally to the instant case. It is undisputed that none of the CBAs at issue specifies that defendant committed itself to provide lifetime and unalterable healthcare benefits. It is also undisputed that the CBAs contain three-year durational provisions. Therefore, the CBAs guarantee benefits only until the agreements expire and no longer. In other words, because the CBAs do not specify an alternative ending date for healthcare benefits, their general durational clauses control.

The trial court here found that the CBAs are not ambiguous and that "[d]efendant did not promise or otherwise obligate itself under the clear language to provide a certain duration or level of retiree healthcare coverage beyond the term of each CBA." Indeed, it held that "plaintiffs have not pointed to any specific CBA language explicitly conferring lifetime or unalterable healthcare benefits on retirees." Nevertheless, the court held that plaintiffs are entitled to lifetime healthcare benefits because "plaintiffs have proffered unrefuted evidence that defendant has acknowledged that retiree

healthcare coverage is a lifetime benefit." Finally, the trial court held that these lifetime benefits are not unalterable because "plaintiffs have not established [that] defendant has unequivocally acknowledged that it is obligated to provide[] unalterable retiree healthcare coverage." The court concluded that while "retirees have lifetime healthcare benefits," defendant "may reasonably modify the scope and level of benefits from those that existed when the retirees retired."

While the trial court correctly held that the CBAs are not ambiguous and that they do not provide for unalterable lifetime healthcare benefits, it nonetheless relied on extrinsic evidence to conclude that plaintiffs are entitled to lifetime benefits that can be reasonably modified. However, since the CBAs are not ambiguous, the trial court should not have considered extrinsic evidence because the "parol evidence rule . . . prohibits the use of extrinsic evidence to interpret unambiguous language within a document." *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010); see also *In re Smith Trust*, 480 Mich at 24.

Although the Court of Appeals recognized that the "CBAs do not expressly state whether the benefits were promised indefinitely or only for the duration of the CBA," it concluded that "other contract language creates a latent ambiguity regarding whether the healthcare benefits are vested." *Kendzierski*, 319 Mich App at 286. Given this "latent ambiguity," the Court held that the "trial court properly examined extrinsic evidence to determine the meaning of the CBAs" and properly concluded on this basis that the retirees are entitled to lifetime healthcare benefits. *Id*. at 286-287. However, the appellate court held that the trial court erred by holding that these benefits

could be modified absent plaintiffs' consent because a party may not unilaterally alter vested rights. *Id*. at 288-289.

Respectfully, the Court of Appeals erred by finding a latent ambiguity. "A latent ambiguity . . . is one that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." *Shay*, 487 Mich at 668 (quotation marks and citation omitted). In other words, "[a] latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the necessity for interpretation or a choice among two or more possible meanings." *Id*. (quotation marks and citations omitted). Here, the Court of Appeals relied on language within the contract itself to find an ambiguity. Therefore, the Court of Appeals actually found a *patent* ambiguity, not a *latent* ambiguity, because the former arises "from the face of the document." *Id*. at 667.[12] Nevertheless, the

[12] Both defendant's counsel and plaintiffs' counsel acknowledged at oral argument before this Court that the Court of Appeals misused the term "latent ambiguity." The classic example of a latent ambiguity is found in *Raffles v Wichelhaus*, 2 Hurl & C 906; 159 Eng Rep 375 (1864), in which the parties contracted for a shipment "to arrive ex Peerless" from Bombay, but, unbeknownst to the parties, there were two ships named "Peerless" sailing from Bombay on that day, which created a latent ambiguity with regard to the ship to which the contract referred. Nothing similar occurred in the instant case. In other words, nothing outside the four corners of the CBAs calls into question the meaning of the language used within the four corners of the CBAs. Indeed, that a Macomb County Executive once stated that defendant "provides retiree health benefits to eligible County retirees (and their eligible beneficiaries) for their lifetimes" is not even inconsistent with our conclusion that the *CBAs* do not require defendant to provide benefits to eligible retirees (and beneficiaries) for their lifetimes. Defendant, of course, remains free to provide greater benefits to retirees (and beneficiaries) than those required under the CBAs.

Court of Appeals erred by finding even a patent ambiguity. As the trial court correctly held, the CBAs here are unambiguous.

The Court of Appeals rested its ambiguity conclusion on three provisions of the CBAs: (a) "the CBAs contain a 'survivor' option permitting continuation of a surviving spouse's healthcare coverage following the death of the retiree," (b) "the CBAs provide that the agreement may be terminated if the retiree fails to enroll in Medicare at age 65," and (c) "the CBAs provide that healthcare coverage is suspended while the retiree has coverage through another employer but then states that coverage through the CBA recommences once the coverage through the other employer ends." *Kendzierski*, 319 Mich App at 286. On the basis of these provisions, the Court of Appeals concluded that the CBAs were ambiguous as to "whether the parties intended for the retiree benefits to vest . . . ." *Id.*

We do not agree that these provisions render the CBAs ambiguous. The first provision relied on by the Court of Appeals—the surviving-spouse provision—reads:

> Coverage shall be limited to the current spouse of the retiree, at the time of retirement, provided such employee shall retire on or after January 1, 1974. Coverage for the eligible spouse will terminate upon the death of the retiree unless the retiree elects to exercise a retirement option whereby the eligible current spouse receives applicable retirement benefits following the death of the retiree.

The Court of Appeals concluded that because the provision "contemplates that coverage will continue until, and even after, the death of the retiree," it "indicates that the parties intended that the healthcare coverage would last beyond the three-year term of the individual CBAs." *Kendzierski*, 319 Mich App at 286. In our judg-

ment, however, the text of the provision does not warrant this conclusion because it only speaks to the disposition of retiree benefits upon the death of the retiree, which could occur within the three-year duration of the CBAs.

The United States Court of Appeals for the Seventh Circuit, in considering a similar surviving-spouse provision, stated as follows:

> The retirees argue that the [collective-bargaining insurance agreement] is implicitly extended beyond its three-year term by a clause that provides benefits for surviving spouses until their death or remarriage. This provision, however, refers to the eligibility of individuals to receive benefits under the agreement, not to the *duration of the agreement*. Surviving spouses were eligible to receive benefits only so long as the [collective-bargaining insurance agreement] was in place. [*Cherry v Auburn Gear, Inc*, 441 F3d 476, 483 (CA 7, 2006).][13]

Similarly, the surviving-spouse provision of the CBAs in this case governs the eligibility of the spouse upon

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[13] Other federal circuits have interpreted surviving-spouse provisions in a similar fashion. See, e.g., *Barton v Constellium Rolled Prod-Ravenswood, LLC*, 851 F3d 349, 357 (CA 4, 2017) ("The pensioned surviving spouses [summary plan description] provision similarly offers the Retirees little help. . . . This language simply defines a category of people *eligible* to receive benefits; it says nothing about the *duration* for which those benefits will last."); *Crown Cork & Seal Co v Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 501 F3d 912, 918 (CA 8, 2007) (concluding that a surviving-spouse provision did not contain "explicit vesting language"); *IUE-CWA v Gen Electric Co*, 745 F Appx 583, 598 (CA 6, 2018) (declining to infer vesting from a surviving-spouse provision). See also *Little Chute Area Sch Dist v Wisconsin Ed Ass'n Council*, 373 Wis 2d 668, 686-687; 2017 WI App 11; 892 NW2d 312 (2017) ("[T]he provision is fully compatible with non-vesting, as survivorship benefits would be available if, for example, an individual retiree died during the term of the relevant CBA, or during a longer period if the parties chose to carry over the survivorship benefit in subsequent CBAs.") (citation omitted).

the death of the retiree; it does not set the duration of either the retiree's or the spouse's benefits. Therefore, the provision does not evidence an intention that the benefits continue beyond the term provided in the durational clause of the CBAs.[14]

The Court of Appeals' reliance on the provision requiring enrollment in Medicare at age 65 is also unavailing. That provision states:

> Retired employees and/or their current spouse, upon reaching age 65, shall apply if eligible, and participate in the Medicare Program . . . at which time the Employer's obligation shall be only to provide "over 65 supplemental" hospital-medical benefit coverage. Failure to participate in the aforementioned Medicare Program, shall be cause for termination of Employer paid coverage of applicable hospital-medical benefits, as outlined herein for employees who retire and/or their current spouse.

The Court of Appeals reasoned that "[t]his provision again contemplates that the coverage outlasts the three-year period of the CBA given that a retiree may retire years before turning 65." *Kendzierski*, 319 Mich App at 286. But the Sixth Circuit in *Serafino v City of Hamtramck*, 707 F Appx 345 (CA 6, 2017), considered

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[14] Plaintiffs direct our attention to *Bidlack v Wheelabrator Corp*, 993 F2d 603 (CA 7, 1993), which relied upon a surviving-spouse provision in finding a contract ambiguous as to whether the parties intended retiree benefits to vest. We are not persuaded by plaintiffs' reliance on *Bidlack* for two reasons. First, the provision at issue in *Bidlack*, at least arguably, contained durational language—providing that benefits " 'shall be continued for the spouse after the death of the retiree' "—while the provision at issue in our case does not. *Id*. at 605. Second, *Bidlack* was decided before *Tackett* and *Reese*, and its ambiguity analysis stands in tension with *Reese*. Compare *Bidlack*, 993 F2d at 608 ("[T]he agreements are not silent on the issue [of vesting]; they are merely vague."), with *Reese*, 583 US at ___; 138 S Ct at 766 ("No provision specified that the health care benefits were subject to a different durational clause.").

and rejected a similar argument.[15] The provision at issue in that case stated that the employer would pay retirees' medical expenses " 'until that retired employee attains the age of sixty-five (65) or is eligible for Medicare or Medicaid.' " *Id*. at 348. The Sixth Circuit concluded that rather than indicating any intention that the retiree benefits vest, the provision served only to " 'guarantee[] benefits until the agreement expires, nothing more.' " *Id*. at 352 (emphasis omitted), quoting *Gallo*, 813 F3d at 269. The provision at issue here, by contrast, does not contain even a guarantee of benefits for the duration of the agreement but, rather, conditions continued benefits upon enrollment in Medicare if a retiree reaches age 65 within the duration of the CBA.[16] We are not persuaded that this provision demonstrates that benefits will necessarily outlast the expiration of the CBA itself.

Finally, we also do not find that the subsequent-employment provision creates an ambiguity as to whether the parties intended that retiree benefits would vest. It states:

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[15] While *Serafino* is unpublished, the Sixth Circuit later reaffirmed its analysis in *Cooper*, 884 F3d at 618-619, recognizing that *Reese* confirmed that the Sixth Circuit's reasoning in *Serafino* was correct.

[16] For this reason, *Matthews v Chicago Transit Auth*, 2016 IL 117638, ¶¶ 83-84; 51 NE3d 753 (2016), upon which plaintiffs rely, is also distinguishable. The Illinois Supreme Court in that case determined that a provision of the CBA stating that the " 'benefit terminates when the retiree attains age 65' " was a "durational provision" and demonstrated the parties' intent that retiree benefits not be "limited by the durational term of the CBA." *Id*. In the instant case, by contrast, the provision at issue indicates that failure to enroll in Medicare "shall be cause for termination" of benefits. Thus, unlike the provision at issue in *Matthews*, the relevant provision here does not supplant the general durational term of the CBA but, instead, sets forth a circumstance wherein retiree benefits will terminate before the expiration of the CBA.

> Employees who retire under the provisions of the Macomb County Employees' Retirement Ordinance, and/or their current spouse, who subsequently are gainfully employed, shall not be eligible for hospital-medical benefits, during such period of gainful employment . . . .

The Court of Appeals identified in this provision an implication "that the retirees will receive healthcare benefits far beyond the three-year term of the CBAs." *Kendzierski*, 319 Mich App at 286. This is not a necessary implication, however, because a retiree might alternatively obtain coverage through another employer before the three-year term of the CBA expires. Moreover, as explained in *Reese*, we are not engaged here in a search for any implication that benefits continue past the expiration of the CBA itself but, rather, are seeking provisions that, taken as a whole, reasonably and clearly indicate that the retiree benefits are to continue beyond the duration of the CBAs. *Reese*, 583 US at ___; 138 S Ct at 766 ("Shorn of *Yard-Man* inferences, this case is straightforward. The 1998 agreement contained a general durational clause that applied to all benefits, unless the agreement specified otherwise. No provision specified that the health care benefits were subject to a different durational clause.").

Contrary to the Court of Appeals' analysis, none of these provisions gives rise to an ambiguity.[17] Each of

[17] The dissent relies on the same three provisions and concludes that these "imply that the County and the unions intended that healthcare benefits specific to *retirees* would last for those retirees' entire *retirements*." For the reasons explained earlier in this opinion, we disagree. The dissent also contends that these provisions "differentiate these contracts from those at issue in *Reese*." However, the dissent fails to recognize that these provisions are similar to provisions at issue in *Tackett*; that *Tackett* rejected the Sixth Circuit's conclusion that these provisions "indicate[] an intent to vest retirees with lifetime benefits," *Tackett*, 574 US at 435, and that *Reese*, 583 US at ___; 138 S Ct at 765, 763, held that "the inferences that this Court rejected

the events addressed in these provisions could occur during the three-year duration of the CBAs. That each

in *Tackett*" cannot be "used to render a collective-bargaining agreement ambiguous . . . ." The dissent also relies on *Alday v Raytheon Co*, 693 F3d 772, 785 (CA 9, 2012), and *Quesenberry v Volvo Trucks North America Retiree Healthcare Benefit Plan*, 651 F3d 437, 441 (CA 4, 2011), for the proposition that an "ambiguity can arise 'where a CBA links eligibility for a particular right "to an event that would almost certainly occur after the expiration of the agreement" . . . [because] such linkage "signals the parties' intent to continue retirement benefits notwithstanding expiration." ' " (Alteration in minority opinion.) However, those cases are significantly distinguishable. The provision at issue in *Alday*, 693 F3d at 783, at least arguably, contained durational language—" 'the Employer agrees to continue to provide the Comprehensive Medical Plan coverages for which they were covered while active employees, until the retired employee attains age 65' "—while the provisions at issue in our case do not. Furthermore, the provision at issue in *Quesenberry* tied benefits to an event that was practically certain to occur after the expiration of the CBA—"[i]t is almost inconceivable . . . that this negotiated mechanism would be triggered during the scope of the 2005 CBA," *Quesenberry*, 651 F3d at 441—while it is by no means inconceivable that the events addressed in the provisions at issue in our case could take place during the three-year duration of the CBAs. Further, *Alday* and *Quesenberry* were decided before both *Tackett* and *Reese*, and as noted by the *Tackett* Court, "when a contract is silent as to the duration of retiree benefits, a court may *not infer* that the parties intended those benefits to vest for life." *Tackett*, 574 US at 442 (emphasis added). Finally, contrary to the dissent's contention, we do "leave[] open [the] possibility of ambiguity[.]" For example, if a CBA contained a general durational clause and also a provision, as with the one in *Quesenberry*, that tied benefits to an event that could only occur or would almost certainly not occur until after the expiration of the CBA, that CBA would be ambiguous (at least in the absence of any other provision that might resolve the ambiguity). Accordingly, contrary to the dissent's suggestion, we do not "condition a finding of ambiguity on whether the agreement contained language expressly disclaiming application of the general durational clause to the promise of retiree healthcare," nor do we require "express language in the CBAs providing a different duration for retiree healthcare . . . ." But we *do* require something more than a provision that ties benefits to an event that could *conceivably* occur after the expiration of the CBA in order to counter a general durational clause, and we simply disagree with the dissent's conclusion that the CBAs at issue here contain provisions that tie benefits to events that could only occur or would *almost certainly* not occur until after the expiration of the CBAs.

of these events could occur *beyond* that period does not indicate that the parties intended coverage to last beyond the term of the CBAs. Moreover, reading these provisions as encompassing events beyond the duration of the CBAs would obviously give rise to what we view as an altogether unnecessary conflict between these provisions and the general durational provision of the CBAs, when both a more reasonable and a more harmonious understanding can be achieved using the interpretive analysis previously set forth in this opinion. See, e.g., *Singer v Goff*, 334 Mich 163, 168; 54 NW2d 290 (1952) (recognizing "the cardinal principle which requires us to construe this contract as a whole and give harmonious effect, if possible, to each word and phrase"). See also *Barton v Constellium Rolled Prod-Ravenswood, LLC*, 851 F3d 349, 357 (CA 4, 2017) ("One can reconcile the dependent coverage provision with the durational language by reading the former to terminate benefits for a retiree's dependents at the time of the retiree's death, while the benefits for dependents of surviving retirees terminate at the end of the CBA. This reading seems the likelier manifestation of the parties' intent, both because it harmonizes the purportedly conflicting provisions and because the dependent coverage sections of the [summary plan description] contain nothing explicit about vesting."). Therefore, simply because these events could occur beyond the duration of the CBAs does not lead us to conclude that the parties intended such coverage to last in perpetuity. Accordingly, these provisions do not render the CBAs ambiguous.[18]

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[18] The dissent finds it "odd" that we "interpret[] the agreement as giving benefits for only a short time to any employee who retires near the end of a term, whereas an employee who retires near the beginning of the same CBA would be entitled to nearly three years of those very same benefits." However, that is simply how CBAs with a three-year

The CBAs contain a general three-year durational clause, and no provision specifies that the benefits in dispute are subject to any different duration. If the parties meant to vest healthcare benefits for life, they easily could have said so in the CBAs, but they did not.[19] The CBAs specify that "all agreements and understandings, expressed, implied, written or oral, are set forth in this Agreement" and that "[t]his Agreement expresses the complete understanding of the Parties on the subject of . . . benefits . . . ." Therefore, the only reasonable interpretation of the CBAs is that the contractual right to healthcare benefits expired when the CBAs expired.[20] This holding is consistent with our holding in *Arbuckle* that given the durational clauses at issue, the provisions that prohibited the coordination of benefits terminated when the agreements expired.[21] *Arbuckle*, 499 Mich at 541-543. It is also

duration operate. In other words, CBAs, by their nature, regularly expire and are replaced with new CBAs, meaning that both employees who retire and new employees who are hired near the end of the CBA will only be covered by the terms of that CBA until that CBA expires.

[19] That the parties have modified the retiree-benefits provisions of the CBAs over time—see Defendant's Supplemental Brief, p 16 ("[R]etiree healthcare benefits have been modified with nearly every CBA since 1987"); Exhibit 1 to Plaintiffs' Motion for Summary Disposition (tracking modifications to retiree-benefit provisions since 1989)—further evidences that the parties did not intend the benefits to be permanent or unalterable. See *Cherry*, 441 F3d at 483 ("[T]he parties' practice of changing the contractual terms in succeeding agreements lends support to [the defendant's] claim that neither party understood the benefits to be permanent or inalterable.").

[20] This Court has already held that there is no constitutional right to retiree healthcare benefits, i.e., that such benefits are not " 'accrued financial benefits' " subject to protection from diminishment or impairment by Const 1963, art 9, § 24, and the parties here do not argue to the contrary. See *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 645; 698 NW2d 350 (2005).

[21] We recognize that *Arbuckle* is somewhat distinguishable because in that case the agreements specifically provided that the prohibition

consistent with *Tackett*, which held that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement" and that while "a collective-bargaining agreement may provide in explicit terms that certain benefits continue after the agreement's expiration[,] . . . when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Tackett*, 574 US at 441-442 (quotation marks, citation, and brackets omitted). Because the CBAs at issue here do not indicate that the provided benefits are to continue after the agreement's expiration, this Court will not infer that the parties intended those benefits to vest for life. Instead, we hold that the contractual obligations provided therein expired when the CBAs expired.

IV. CONCLUSION

Because we conclude that the CBAs did not grant plaintiffs a vested right to lifetime and unalterable retirement healthcare benefits, in lieu of granting leave to appeal, we reverse the judgment of the Court

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against benefit coordination was to continue until the termination or amendment of the agreements, whereas in the instant case the specific provisions pertaining to retiree healthcare benefits are silent regarding their duration. However, as *Gallo*, 813 F3d at 269, correctly recognized, "[w]hen a specific provision of the CBA does not include an end date, we refer to the general durational clause to determine that provision's termination." In other words, "[a]bsent a longer time limit in the context of a specific provision, the general durational clause supplies a final phrase to every term in the CBA: 'until this agreement ends.' " *Id*. See also *Gibraltar Sch Dist v Gibraltar MESPA-Transp*, 443 Mich 326, 328; 505 NW2d 214 (1993) ("[A]n agreement to arbitrate does not survive expiration of a collective bargaining contract . . . ."); *Ottawa Co v Jaklinski*, 423 Mich 1, 29; 377 NW2d 668 (1985) (opinion by WILLIAMS, C.J.) ("Jaklinski's right to arbitrate her claim that the Sheriff's failure to reappoint her was not for just cause did not survive the expiration of the collective bargaining agreement.").

of Appeals and remand to the Macomb Circuit Court for entry of an order granting summary disposition to defendant consistent with this opinion.

ZAHRA, VIVIANO, and CLEMENT, JJ., concurred with MARKMAN, J.

MCCORMACK, C.J. (*dissenting*). The majority holds that the defendant, Macomb County (the County), is entitled to summary disposition because the County's contractual promise to provide retiree healthcare benefits does not extend beyond the duration of the County's collective-bargaining agreements (CBAs) with its employee unions. It reasons that the general durational clauses in the CBAs unambiguously govern that promise because the agreements neither include language exempting retiree healthcare benefits from that general period nor explicitly promise healthcare benefits for the retirees' lifetimes.

The plaintiffs, retired County employees, believe the specific promise of retirement healthcare extended beyond the general contract period. Their understanding has commonsense appeal: they thought *retirement* healthcare was a promise that they would have healthcare for the period of their *retirement*. They cite specific language in the agreements governing retiree healthcare to support their view.

I agree with the majority's understanding of the principles that guide our review of this dispute. But I disagree with its application of those principles to these agreements. Because the CBAs are ambiguous about whether the County promised retiree healthcare benefits for not more than three years, or instead for the full period of plaintiffs' retirements, I would send the question to the fact-finder, who may properly consider extrinsic evidence to resolve it. I respectfully dissent.

I. BACKGROUND

For nearly three decades, the County has provided healthcare benefits to its retired employees. Those benefits are described in the CBAs that the County entered into with the unions that represented various groups of County employees.[1] To qualify for the benefits, the CBAs require three things: a retiree must (1) satisfy a years-of-service requirement, (2) be separated from employment with the County because of retirement, and (3) be eligible to receive benefits under the County's retirement ordinance. See Part III of the majority opinion.

Each CBA also contained a general, three-year durational provision. The final article of the 2008–2010 CBAs, for example, provided, "This Agreement shall continue in full force and effect until December 31, 2010." The parties agree that earlier CBAs contained either this same durational clause (varying only in end date) or a substantially similar one. The historical practice was that at the end of every three-year period,[2] the County and the unions would enter into a successive CBA for another three-year term.

Beginning in 2009, in the middle of the 2008–2010 CBAs, the County unilaterally implemented changes in the retirees' healthcare benefits. According to the plaintiffs, these changes resulted in some retirees paying more for prescription copays, changed deductibles, and reduced plan options. The plaintiffs filed this class action on behalf of themselves and a class of about 1,600 retirees, all of whom retired under these

[1] The County entered into a different CBA with each bargaining unit, but the parties agree that the relevant language in each CBA is "materially similar."

[2] The first round of CBAs expired on December 31, 1989.

CBAs and received retiree healthcare benefits from the County. The plaintiffs believe that the County violated the 2008–2010 CBAs by making the changes unilaterally, without the retirees' consent. The County responded that the benefit changes were consistent with and allowed by the CBAs.

But a more fundamental dispute arose. The plaintiffs sought a permanent injunction requiring the County to continue providing prechange healthcare benefits for the plaintiffs' lifetimes and to prevent the County from changing those benefits. According to the County, however, at no time did any of the CBAs (the 2008–2010 CBAs and their predecessors) provide a retiring employee with healthcare benefits for the retiree's lifetime. Instead, the County contends that the plaintiffs' right to receive healthcare benefits was subject to each CBA's three-year durational clause. Thus, the County argues, none of these plaintiffs had a right to continued healthcare benefits beyond any three-year term, absent a new contractual promise in a successive CBA. Or, put differently, each CBA only guaranteed retirement healthcare for the three-year period it governed. After that, the retirees had—and have—no right to future healthcare benefits, absent a new contractual promise from the County.

The plaintiffs, on the other hand, believe that the County promised to provide union members who retired during the term of a CBA with specified healthcare benefits for their retirements; that is, for the rest of their lives. They believe the CBAs, and three provisions in them in particular, support their view. Each provision specifically governs retiree healthcare.

One clause provided that coverage would end upon the death of the retiree or, if the retiree made a spousal

election, continue for the retiree's spouse after the retiree's death (the survivor clause):

> Coverage shall be limited to the current spouse of the retiree, at the time of retirement, provided such employee shall retire on or after January 1, 1974. Coverage for the eligible spouse will terminate upon the death of the retiree unless the retiree elects to exercise a retirement option whereby the eligible current spouse receives applicable retirement benefits following the death of the retiree.

Another clause required retirees to enroll in federally funded healthcare upon reaching age 65, after which the County's obligation was to provide only supplemental coverage (the supplemental-care clause):

> Retired employees and/or their current spouse, upon reaching age 65, shall apply if eligible, and participate in the Medicare Program at their expense as required by the Federal Insurance Contribution Act, a part of the Social Security Program, at which time the Employer's obligation shall be only to provide "over 65 supplemental" hospital-medical benefit coverage. Failure to participate in the aforementioned Medicare Program, shall be cause for termination of Employer paid coverage of applicable hospital-medical benefits, as outlined herein for employees who retire and/or their current spouse.

Finally, the CBAs addressed temporarily suspending the coverage of any retiree who becomes gainfully employed (the subsequent-employment clause):

> Employees who retire under the provisions of the Macomb County Employees' Retirement Ordinance, and/or their current spouse, who subsequently are gainfully employed, shall not be eligible for hospital medical benefits, during such period of gainful employment, as hereinafter defined: Gainful employment is defined as applying to retiree and/or spouse of retiree who are employed subsequent to the employee retirement. If such

> employment provides hospital-medical coverage for both retiree and spouse, the County is not obligated to provide said coverage unless and until the coverage of either person is terminated. If the coverage is not provided to retiree and spouse, the County will provide hospital-medical coverage for the person not covered. [Paragraph structure omitted.]

II. AMBIGUITY

The majority agrees with the County. The majority holds that because the CBAs do not expressly provide a separate end date for retiree healthcare benefits, the CBAs' general, three-year durational clauses unambiguously govern these benefits. The majority does not believe that the survivor clause, the supplemental-care clause, or the subsequent-employment clause create ambiguity because those events might occur during the three-year term of the agreement. And seeing no ambiguity, the majority (correctly) disregards the extrinsic evidence, such as the County's issuing of bonds to fund its retiree healthcare obligation and the many statements by County officials and representatives that support the plaintiffs' contention that the County's promise to provide retiree healthcare benefits extends far beyond 2010.

I agree with the majority's understanding of recent federal jurisprudence governing agreements between employers and their retired employees about healthcare benefits. See *M&G Polymers USA, LLC v Tackett*, 574 US 427; 135 S Ct 926; 190 L Ed 2d 809 (2015); *CNH Indus NV v Reese*, 583 US ___; 138 S Ct 761, 766; 200 L Ed 2d 1 (2018). I also agree that this jurisprudence brings the United States Court of Appeals for the Sixth Circuit in line with the principles which govern this Court's contract interpretation.

But I am not convinced that any of those principles compel the result reached by the majority. The question is whether these CBAs are ambiguous. The *Tackett* Court did not address whether there was ambiguity in the parties' CBA; instead, the Court rejected the Sixth Circuit's unique approach to this particular contractual question and remanded the case for the Court "to apply ordinary principles of contract law in the first instance." *Tackett*, 574 US at 442. And while the *Reese* Court held that the particular agreement was unambiguous and did not provide for lifetime benefits, that CBA differed from those here in one important respect that mattered to the Court's analysis: it included language that specifically tied the promise of retiree healthcare to the agreement's general durational clause. *Reese*, 583 US at ___; 138 S Ct at 766 (explaining that the CBA provided that "the health benefits plan 'ran concurrently' with the collective-bargaining agreement, tying the health care benefits to the duration of the rest of the agreement") (citation and brackets omitted).

CBAs must be interpreted "according to ordinary principles of contract law . . . ." *Tackett*, 574 US at 435; see also *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 327; 550 NW2d 228 (1996) ("A collective bargaining agreement, like any other contract, is the product of informed understanding and mutual assent."). The guiding principle is that "as with any other contract, the parties' intentions control." *Tackett*, 574 US at 435 (quotation marks and citation omitted); see also *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924) ("The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate."). When a contract lacks explicit terms

on the duration of retiree benefits, "implied terms" or "industry practice" may show the parties intended those benefits to extend beyond the contract's general durational period. *Tackett*, 574 US at 443 (Ginsburg, J., concurring); see also *Reese*, 583 US at ___; 138 S Ct at 765 (noting that "[t]he Sixth Circuit did not point to any explicit terms, implied terms, or industry practice suggesting that the 1998 agreement vested health care benefits for life") (citation omitted); *Tackett v M&G Polymers USA, LLC*, 811 F3d 204, 209 (CA 6, 2016) ("Thus, while the Supreme Court's decision prevents us from presuming that 'absent specific durational language referring to retiree benefits themselves, a general durational clause *says nothing* about the vesting of retiree benefits,' we also cannot presume that the *absence* of such specific language, by itself, evidences an intent *not* to vest benefits or that a general durational clause says *everything* about the intent to vest.") (citation omitted); *Morley v Auto Club of Mich*, 458 Mich 459, 466; 581 NW2d 237 (1998) ("[W]hat is plainly implied from the language used in a written instrument is as much a part thereof as if it was expressed therein.") (quotation marks and citation omitted). For example, ambiguity can arise "where a CBA links eligibility for a particular right 'to an event that would almost certainly occur after the expiration of the agreement' . . . [because] such linkage 'signals the parties' intent to continue retirement health benefits notwithstanding expiration.' " *Alday v Raytheon Co*, 693 F3d 772, 785 (CA 9, 2012) (brackets omitted), quoting *Quesenberry v Volvo Trucks North America Retiree Healthcare Benefit Plan*, 651 F3d 437, 441 (CA 4, 2011).

All of that is to say that a court should not engage in presumptions that favor either the plaintiffs or the County. But the implied terms make this a hard case.

Unlike in the CBA at issue in *Reese*, these CBAs did not tie retirement healthcare benefits to the general durational clause. And specific clauses in these CBAs governing eligibility for retirement healthcare imply that the County and the unions intended that healthcare benefits specific to *retirees* would last for those retirees' entire *retirements*.

General principles of contract law lead me to conclude that these contracts are ambiguous, because they are equally susceptible to more than one meaning. *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich 32, 40; 892 NW2d 794 (2017); see also *Hall v Equitable Life Assurance Society of the United States*, 295 Mich 404, 409; 295 NW 204 (1940) (" 'A patent ambiguity is one apparent upon the face of the instrument, arising by reason of inconsistency, obscurity or an inherent uncertainty of the language adopted, such that the effect of the words in the connection used is either to convey no definite meaning or a double one.' "), quoting *Zilwaukee Twp v Saginaw-Bay City R Co*, 213 Mich 61, 69; 181 NW 37 (1921).[3] And because these CBAs are equally susceptible to being read as promising retirement healthcare for retirement, I believe a jury should resolve this question.

In my view, the general durational clause is doing more work for the majority than it should. These CBAs contain no provision that connects the promise of retiree healthcare benefits to the duration of any CBA. Cf. *Reese*, 583 US at ___; 138 S Ct at 766 (explaining that the CBA at issue provided that "the health benefits plan 'ran concurrently' with the

[3] I agree with the majority that the ambiguity identified by the Court of Appeals is a patent ambiguity, not a latent ambiguity. See *Shay v Aldrich*, 487 Mich 648, 667-668; 790 NW2d 629 (2010). Because I see patent ambiguity on the face of the CBAs, I don't address latent ambiguity.

collective-bargaining agreement, tying the health care benefits to the duration of the rest of the agreement") (citation and brackets omitted); *Cherry v Auburn Gear, Inc*, 441 F3d 476, 482-483 (CA 7, 2006) (concluding that there was no ambiguity because the CBA provided that the employer's obligation to provide benefits continued " 'during the period of this agreement' "); *Barton v Constellium Rolled Prod-Ravenswood, LLC*, 851 F3d 349, 352-354 (CA 4, 2017) (finding that there was no ambiguity because the CBA provided that retiree health benefits " 'shall remain in effect for the term of this . . . Labor Agreement' "); *Crown Cork & Seal Co, Inc v Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 501 F3d 912, 917-918 (CA 8, 2007) (finding that there was no ambiguity because the CBAs provided that the employer would continue to provide benefits " 'without modification for the life of' " the CBAs).

But the CBAs in this case contain provisions that imply the opposite conclusion. The CBAs' survivor clause, the supplemental-care clause, and the subsequent-employment clause each imply that retirement healthcare is a benefit that generally runs with retirement for life. In my view, these more specific provisions, the nature of the benefit, and the lack of a provision tying the benefits to the general durational clause (unlike in *Reese*) creates ambiguity.

Yes, a retiree can die, become Medicare-eligible, or become re-employed within any given three-year term of a CBA. And, therefore, I agree with the majority that these provisions do not irreconcilably conflict with the three-year durational clause. But an irreconcilable conflict is not the only way a contract can be ambiguous. As this Court stated in *Hall*, 295 Mich at 409, a contract may be ambiguous "by reason of inconsistency,

obscurity or an inherent uncertainty of the language adopted, such that the effect of the words in the connection used is either to convey no definite meaning or a double one." (Quotation marks and citation omitted.) See also *Reese*, 583 US at ___; 138 S Ct at 765 (explaining that a CBA is ambiguous if it is "reasonably susceptible to at least two reasonable but conflicting meanings") (citation and quotation marks omitted).

Each of these provisions supports a reading that the CBAs promise retiree healthcare benefits for retirement (that is, for life) for those employees who become eligible for them during the term of the contract. For example, the survivor clause says that healthcare benefits for an eligible spouse "will terminate *upon the death of the retiree* unless the retiree elects to exercise a retirement option, whereby the eligible current spouse receives applicable retirement benefits following the death of the retiree." (Emphasis added.) This promise continues spousal coverage *until the death of the retiree*, and even beyond that for an indefinite period, if the retiree makes a spousal election. That is, even if the retiree-spouse dies before the CBA expires, the contractual language implies that the spousal benefits continue beyond any three-year term.

The supplemental-care clause and the subsequent-employment clause similarly support plaintiffs' reading of the CBAs. While it is possible for the triggering events to happen within the three-year term of a CBA, that durational limitation isn't the most commonsense reading of the language. The context is *retirement*, after all—that portion of life following work and extending to death. The parties to the CBAs might have intended the natural reading of the supplemental-care clause: that it offers supplemental coverage once a retiree becomes eligible for Medicare, which, for many employees who

retire during a CBA, will be some time beyond that three-year period. See *Consol Rail Corp v R Labor Executives' Ass'n*, 491 US 299, 311; 109 S Ct 2477; 105 L Ed 2d 250 (1989) (stating that practice, usage, and American custom must be considered when interpreting a CBA); *United Steelworkers of America v American Mfg Co*, 363 US 564, 567; 80 S Ct 1343; 4 L Ed 2d 1403 (1960) ("[S]pecial heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."). It is at least equally reasonable to conclude that, by "link[ing] eligibility for a particular right 'to an event that would almost certainly occur after the expiration of the agreement'—e.g., turning 65 or becoming eligible for Medicare—such linkage 'signals the parties' intent to continue retirement health benefits notwithstanding expiration.' " *Alday*, 693 F3d at 785, quoting *Quesenberry*, 651 F3d at 441 (brackets omitted).

Understanding the retiree healthcare benefits to apply to *retirement* for those employees who enter that status during the term of the CBA is at least equally reasonable given the context. In my view, the majority's conclusion that the parties must have intended the opposite result—that the general durational clause limits retirement healthcare benefits to three years (or less, depending on when an employee retires)—doesn't account for the CBAs' implied terms, which differentiate these contracts from those at issue in *Reese*.

If these retiree healthcare benefits are guaranteed for no more than three years, then for any single retiring employee the length of the retirement benefit will depend solely on when that employee retires within the three-year period of the CBA. That is, the majority interprets the agreement as giving benefits

for only a short time to any employee who retires near the end of a term, whereas an employee who retires near the beginning of the same CBA would be entitled to nearly three years of those very same benefits. It is an odd reading that results in the value of the retirement benefit varying with the arbitrary date of the employee's retirement, rather than years of service or any other factor.

Finally, I respectfully disagree with the majority that my approach to these CBAs is the same approach that the Supreme Court of the United States implicitly rejected in *Tackett* and *Reese*. Neither *Tackett* nor *Reese*—nor our own jurisprudence—compels the result the majority reaches.[4] *Tackett* and *Reese* left open the possibility that a CBA's promise of retiree healthcare might be ambiguous notwithstanding the presence of a general durational clause. Nor did either case condition a finding of ambiguity on whether the agreement contained language expressly disclaiming application of the general durational clause to the promise of retiree healthcare. I assume the Supreme Court left these possibilities open for a reason: there are cases in which, despite a general durational clause, the contractual language is equally susceptible to more than one meaning. I am not convinced that the majority's decision leaves open that possibility of ambiguity;

[4] The majority concludes that an important difference between these CBAs and the agreement in *Reese*—the existence of language *explicitly* linking the providing of retiree healthcare benefits to the CBA's durational clause—was not "dispositive" to the *Reese* Court's analysis. Maybe not—the opinion doesn't say either way. But it was one of several provisions that the Court cited in concluding that the CBA was not ambiguous, *none of which* the Court proclaimed to be dispositive alone. See *Reese*, 583 US at ___; 138 S Ct at 766. And the CBAs in this case do *not* include any similar language explicitly linking retiree healthcare benefits to the durational clause. That makes these CBAs different, and importantly so.

under its framework, it is difficult to imagine under what circumstances a general durational clause will *not* control.[5] While it is true that the parties could have included express language in the CBAs providing a different duration for retiree healthcare, that is simply another way of saying that the parties could have written an unambiguous contract.

Given the patent ambiguity, I would reverse that part of the Court of Appeals' judgment remanding the case to the trial court for entry of summary disposition in favor of the plaintiffs, because the meaning of an ambiguous contract is a question that generally must be decided by the trier of fact. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003) ("It is well settled that the meaning of an ambiguous contract is a question of fact that must be decided by the jury.").

III. RELIEF

The plaintiffs have identified extrinsic evidence that they believe suggests that the County promised retiree healthcare for retirement. The County's actuaries issued regular reports, beginning as early as 1993, describing the benefits as an "IOU" (I owe you)

[5] The majority acknowledges that ambiguity might be found (notwithstanding a general durational clause) if the CBA "tied benefits to an event that could only occur or would almost certainly not occur until after the expiration of the CBA[.]" Again, I acknowledge that there is no irreconcilable conflict here; events triggering the CBAs' survivor clause, supplemental-care clause, or subsequent-employment clause could occur before expiration of the CBA. But unlike the majority, I don't believe it is only "*conceivabl*[*e*]" that these triggering events would occur beyond the expiration of the CBA. These CBAs permit an employee to retire at age 50 and receive both a pension and retiree healthcare benefits. For most employees who retire during a CBA's three-year-term, the triggering events (death or reaching age 65) are almost certain to occur beyond the expiration of that term.

to the County's future retirees. The County created a trust specifically for retiree healthcare, which it funded with tens of millions of dollars to satisfy its future obligations. The County issued bonds to fund that trust when it determined that current funding levels would not be enough to meet its future obligations "for the next 50 years." During labor negotiations, the County's representatives described the retiree healthcare as a "lifetime" benefit. Many retirees tell the same story: that representatives from the County assured them that their healthcare benefits would last their lifetimes. And the County's bargaining history might support the plaintiffs' view: while its position here is that retirement healthcare is only promised for the three years of each CBA, the County has continuously provided it to retirees in every CBA since 1986.[6]

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[6] The County says that every time it negotiated a CBA, both it and the union understood that the unions only represented the interests of active employees, not retirees. See Defendant's Supplemental Brief, p 16 (stating that "[t]he CBAs since 1986 have been negotiated with the County of Macomb by 23 Unions on behalf 'of regular employees,' generally effective every three years."). This approach is consistent with federal labor law, under which a union does not have to bargain on behalf of retired employees because they are no longer members of the bargaining unit. See *Allied Chem & Alkali Workers v Pittsburgh Plate Glass Co*, 404 US 157, 180; 92 S Ct 383; 30 L Ed 2d 341 (1971) (concluding that the future retirement benefits of *active* workers were subject to mandatory bargaining because those benefits were part of their overall compensation). The Court of Appeals has held the same. See *West Ottawa Ed Ass'n v West Ottawa Pub Sch Bd of Ed*, 126 Mich App 306, 328-330; 337 NW2d 533 (1983).

This leads to an interesting question relating to the County's bargaining history with these unions. If the unions did not have to bargain on behalf of retired employees and the County did not have to continue providing healthcare to them, what are we to make of the fact that the parties continued to negotiate about the terms of retiree healthcare in successive CBAs and that those changes were applied to employees who retired under earlier agreements? On the one hand, the

But the County has an explanation for all this evidence: it intends to continue providing such benefits to its retirees, even if it is not contractually obligated to do so. And the County's historical practice of renegotiating retiree healthcare and applying the new terms to past retirees might be evidence that supports its position.

The contracting parties' intent is a disputed question of fact; I believe the Court of Appeals and trial court both erred by determining that, on this record, summary disposition was appropriate. See *Klapp*, 468 Mich at 469. I would remand to the trial court for further proceedings.

IV. CONCLUSION

I disagree with the majority's conclusion that these CBAs unambiguously limit retiree healthcare to the CBAs' general three-year durational clause. It is just as likely that the parties to these CBAs intended the promised *retirement* benefits to apply to an employees' entire *retirement*. I would conclude that there is ambiguity about the parties' intent, and I would let the fact-finder resolve it with the benefit of the extrinsic evidence from both sides.

I respectfully dissent.

BERNSTEIN, J., concurred with MCCORMACK, C.J.

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consistent practice of agreeing to new terms for retiree healthcare and applying those new terms to all retired employees (not just those who retired under the current agreement) might suggest that the parties did not believe the benefits lasted beyond the term of the contract. On the other hand, the continued coverage since 1989, even if the County did not have to provide healthcare for the already-retired employees, might be evidence that the County and the unions all believed that retiree healthcare was promised for retirement.

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition August 3, 2018:

In re JACKSON, No. 156755; Court of Appeals No. 339724. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals orders, and we remand this case to the Court of Appeals, as on reconsideration granted, for plenary consideration of the plaintiff's argument that MCL 600.2963(8), as applied to his complaint for superintending control, is unconstitutional. We do not retain jurisdiction.

MCCORMACK, J. (*concurring*). I concur in the order remanding the case to the Court of Appeals as on reconsideration granted. I write separately to respond to Justice WILDER's suggestion that the Court of Appeals consider why Mr. Jackson is not permitted to work when evaluating his ability to pay his outstanding court fees. Justice WILDER appears to expect litigants to show good cause for their indigence before their fees will be waived or suspended. I note that neither court rule nor statute permits such a consideration.

MCL 600.2963 governs the commencement of civil actions by prisoners. The statute directs courts to evaluate a claim of indigence on the basis of "a certified copy of [the prisoner's] institutional account, showing the current balance in the account and a 12-month history of deposits and withdrawals for the account." MCL 600.2963(1). If the balance in the prisoner's account is less than the filing fee, the court must require the prisoner to pay a partial filing fee. MCL 600.2963(3). But "if the prisoner has no assets and no means by which to pay the initial partial filing fee," the court may, "pursuant to court rule, waive[] or suspend[] the payment of fees" until "the reason for the waiver or suspension no longer exists."[1] MCL 600.2963(7). The statute does not grant courts the discretion to consider other factors. Even if Justice WILDER is correct that "means by which to pay" may comprise employment income, the statute directs courts to make a determination based on a certified copy of the prisoner's institutional account balance and 12-month history of deposits and withdrawals. Deposits may establish that the prisoner has the means by which to pay a filing fee. But nothing in the statute suggests that the absence of deposits somehow permits a court, sua sponte, to hold an evidentiary hearing to determine if the prisoner has failed to earn money despite being capable of working, or, if he is incapable of working, whether the reason for his inability is one the court finds acceptable.

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[1] Since the potentially unconstitutional application of the statute occurred when the Court of Appeals dismissed Mr. Jackson's motion in this case, the relevant question is whether at the time he filed this motion he had assets or means by which to pay an initial partial filing fee, not whether he had "the ability to satisfy his unpaid fees" from the previous action.

The court rule, too, limits courts to considering only ability to pay. "If a party shows by ex parte affidavit or otherwise that he or she is unable because of indigency to pay fees and costs, the court shall order those fees and costs either waived or suspended until the conclusion of the litigation." MCR 2.002(D). *Black's Law Dictionary* defines "indigent" as "[s]omeone who is found to be financially unable to pay filing fees and court costs and so is allowed to proceed *in forma pauperis*." *Black's Law Dictionary* (10th ed).

Finally, the consideration of a litigant's explanation for indigence is itself constitutionally suspect. Although "fee requirements ordinarily are examined only for rationality, . . . access to judicial processes in cases criminal or 'quasi criminal in nature' . . . [may not] turn on ability to pay." *MLB v SLJ*, 519 US 102, 123-124 (1996), quoting *Mayer v Chicago*, 404 US 189, 196 (1971). All indigent litigants have a fundamental right of access to judicial processes in criminal and quasi-criminal cases; a court may not abridge the fundamental rights of some subset of indigents because it finds their poverty inexcusable.

In our system, courts decide *if* a litigant is unable to pay, not *why* a litigant is unable to pay. The alternative Justice WILDER offers is novel, but it is also unworkable. And it has no basis in statute or court rule.

VIVIANO and BERNSTEIN, JJ., join the statement of MCCORMACK, J.

WILDER, J. (*dissenting*). I would deny leave to appeal. Not only did defendant fail to preserve the issue of the constitutionality of MCL 600.2963(8), in addition, the case that defendant relies on in his application to the Court, *Burns v Ohio*, 360 US 252 (1959), involved an appeal in a criminal case, while the instant case involves the ability to bring a subsequent civil action when fees are outstanding for a previous civil action.

Given this Court's remand nevertheless, I would note that, according to the Michigan Department of Corrections website, Mr. Jackson is currently imprisoned at Security Level IV.[1] The MDOC security levels range from I to V, and, "[i]n general, the higher the security level, the more security risk a prisoner presents in terms of manageability or escape potential."[2] Thus, in my view, when considering whether MCL 600.2963(8) is unconstitutional "as applied" to Mr. Jackson,[3] the Court of Appeals should consider all of the relevant facts and circumstances.[4] The

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[1] See Michigan Department of Corrections, *Offender Tracking Information System* <http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=748757> (accessed July 28, 2018) [https://perma.cc/SRG4-AJWH].

[2] See Michigan Department of Corrections, *Definitions/Glossary* <https://www.michigan.gov/corrections/0,4551,7-119-1441_1519---,00.html> (accessed July 28, 2018) [https://perma.cc/NU7X-EJSJ] (under entry for "Level I - V prison housing").

[3] "When faced with a claim that application of a statute renders it unconstitutional, the Court must analyze the statute 'as applied' to the particular case." *Crego v Coleman*, 463 Mich 248, 269; 615 NW2d 218 (2000).

[4] Per MDOC Policy Directive 05.02.110, prisoners "shall be assigned to

Legislature has indicated that a prisoner is not prohibited from "commencing a civil action or filing an appeal in a civil action *if* the prisoner has *no assets and no means by which to pay* the initial partial filing fee." MCL 600.2963(7) (emphasis added). However, "the fact of a prisoner's incarceration cannot be the sole basis for a determination of indigency." *Id*. As a result, consideration solely of "a certified copy of the prisoner's institutional account balance and 12-month history of deposits and withdrawals" may or may not be conclusive regarding a prisoner's indigency. Indeed, consideration of whether a prisoner has the "means by which to pay" logically contemplates consideration of a prisoner's capacity to earn wages and his or her exercise of that capacity,[5] which directly implicates the prisoner's ability to satisfy his or her unpaid fees.

MARKMAN, C.J., joins the statement of WILDER, J.

Leave to Appeal Denied August 8, 2018:

PEOPLE v DEON JOHNSON, No. 152841; Court of Appeals No. 322179.

Summary Disposition August 22, 2018:

COULTER v AUTO CLUB INSURANCE ASSOCIATION, No. 158194; Court of Appeals No. 343868. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The motion for stay is granted. Trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Leave to Appeal Denied August 22, 2018:

BRACKETT v CRYSTAL SPRINGS, No. 158047; Court of Appeals No. 341122.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

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work and/or school . . . ." Policy Directive 05.02.110(A), available at <https://www.michigan.gov/documents/corrections/05_02_110_225743_7.pdf> (accessed July 28, 2018) [https://perma.cc/9V2Z-BY4X]. Both work and school assignments generally pay prisoners according to a specified scale. MDOC Policy Directive 05.02.110, Policy Statement. However, there are circumstances under which prisoners are deemed "unemployable prisoners." See MDOC Policy Directive 05.01.100(Z), available at <https://www.michigan.gov/documents/corrections/0501100_PD_602177_7.pdf> (accessed July 28, 2018) [https://perma.cc/3UKJ-VNAZ].

[5] In this context, "means" is defined as "available resources, especially for the payment of debt." *Black's Law Dictionary* (8th ed).

Reconsideration Denied August 24, 2018:

MCNEILL-MARKS v MIDMICHIGAN MEDICAL CENTER-GRATIOT, No. 154159; reported below: 316 Mich App 1. Leave to appeal denied 502 Mich 851.

NORTH AMERICAN BROKERS, LLC v HOWELL PUBLIC SCHOOLS, No. 155498; Court of Appeals No. 330126. Leave to appeal denied 502 Mich 882.

Rehearing Denied August 24, 2018:

PEOPLE v SKINNER, No. 152448; reported below: 312 Mich App 15. Opinion at 502 Mich 89.

In re MARDIGIAN ESTATE, No. 152655; reported below: 312 Mich App 553. Opinion at 502 Mich 154.

PEOPLE v HYATT, Nos. 153081 and 153345; reported below: 316 Mich App 368. Opinion at 502 Mich 89.

Order Granting Leave to Appeal Vacated September 5, 2018:

PEOPLE v ANTHONY TUCKER, No. 152798; reported below: 312 Mich App 645. Leave to appeal granted at 501 Mich 1077. On order of the Court, the motion to withdraw the application for leave to appeal is considered, and it is granted. We vacate this Court's order of May 25, 2018, granting leave to appeal. Accordingly, the application for leave to appeal is dismissed.

Motion to Expand the Grounds for Review Granted September 5, 2018:

PEOPLE v HAROLD WALKER, No. 155198; Court of Appeals No. 327063. Order directing oral argument entered at 501 Mich 1088. By order of June 1, 2018, the Court directed oral argument on whether to grant the application for leave to appeal or take other action. On order of the Court, the motion for immediate consideration is granted. The motion to expand the grounds for review is considered, and it is granted, limited to the grounds set forth in the motion. The appellant's supplemental brief directed by this Court's June 1, 2018 order is now due on September 25, 2018. In addition to the issues identified in this Court's June 1 order, the appellant shall address whether he is entitled to resentencing irrespective of the scoring of Offense Variable 19, MCL 777.49. See, e.g., *People v Pennington*, 323 Mich App 452 (2018).

Summary Disposition September 12, 2018:

WORKMAN v BRENT, No. 156078; Court of Appeals No. 330325. By order of December 27, 2017, the application for leave to appeal the April 20, 2017 judgment of the Court of Appeals was held in abeyance pending the decision in *TM v MZ* (Docket No. 155398). On order of the Court, the

case having been decided on May 18, 2018, 501 Mich 312 (2018), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *TM v MZ*. We do not retain jurisdiction.

PEOPLE v BELTON, No. 156685; Court of Appeals No. 337965. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

FIFTH THIRD MORTGAGE COMPANY v JODWAY, No. 157212; Court of Appeals No. 333926. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the issue raised by the defendants but not addressed by that court during its initial review of this case regarding Timothy M. Jodway's recoupment defense. In its analysis, the Court of Appeals held that the defendants "are not barred under the doctrine of res judicata from asserting a defense of recoupment premised on plaintiff's alleged violation of the Equal Credit Opportunity Act, 15 USC 1691 *et seq*. (ECOA)." Having reached this determination, the Court of Appeals vacated "the portion of the trial court's award to the extent that it dismissed defendant Alaina M. Zanke-Jodway's recoupment defense as a spouse-guarantor, and remand for further proceedings on that issue." The Court of Appeals did not, however, specifically consider the recoupment defense of Timothy M. Jodway. On remand, the Court of Appeals shall: (1) clarify whether the trial court incorrectly determined that the doctrine of res judicata bars Timothy M. Jodway's recoupment defense, and (2) if res judicata does not apply, determine whether to vacate that portion of the trial court's award dismissing Timothy M. Jodway's recoupment defense and to remand for further proceedings. We do not retain jurisdiction.

PEOPLE v VANCALLIS, No. 157291; Court of Appeals No. 332514. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the claim of ineffective assistance of counsel that was raised in the defendant's Standard 4 brief but not addressed by that court during its initial review of this case. In all other respects, leave to appeal is denied.

PEOPLE v OWEN, No. 157380; Court of Appeals No. 339668. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

SMITH v CHRYSLER GROUP, LLC, No. 157382; Court of Appeals No. 339705. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v NUKE, No. 157528; Court of Appeals No. 341922. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. In addition to the defendant's claims, the Court of Appeals shall consider

whether the trial court erred in awarding jail credit from the date of his arraignment on June 5, 2017, rather than the date of his arrest for the retail fraud charges, June 1, 2017.

PEOPLE v NUKE, No. 157536; Court of Appeals No. 341924. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. In addition to the defendant's claims, the Court of Appeals shall consider the discrepancy between the amount of sentence credit that the trial court awarded the defendant at sentencing and the judgment of sentence, which reflects no credit.

Leave to Appeal Denied September 12, 2018:

PEOPLE v GERMAN, No. 154864; Court of Appeals No. 334489.

PEOPLE v WILLIAM BROWN, No. 155611; Court of Appeals No. 336630.

PEOPLE v WILLIAM FORD, No. 155662; Court of Appeals No. 336646. On order of the Court, the application for leave to appeal the April 5, 2017 order of the Court of Appeals is considered, and it is denied. For purposes of MCR 6.502(G)(1), the Court notes that, although the defendant's motion has been styled as a motion for relief from judgment by the trial court, it should not be regarded as a motion for relief from judgment in any future case. The defendant actually filed a motion to correct an invalid sentence under MCR 6.429, which was properly denied by the trial court for lack of merit. It was also untimely. MCR 6.429(B). The motion to remand for resentencing is denied.

PEOPLE v WALDON, No. 155664; Court of Appeals No. 336935.

PEOPLE v OWENS, No. 155673; Court of Appeals No. 334918.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JAMARR MILNER, No. 155793; Court of Appeals No. 336586.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LISA TAYLOR, No. 155814; Court of Appeals No. 336921.

PEOPLE v MARTELL HARPER, No. 155842; Court of Appeals No. 336957.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v PATRICK JONES, No. 156082; Court of Appeals No. 336541.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v REASTER, No. 156091; Court of Appeals No. 338269.

HENRY v IONIA CORRECTIONAL FACILITY WARDEN, No. 156137; Court of Appeals No. 338237.

PEOPLE v DOHERTY, No. 156162; Court of Appeals No. 336991.

PEOPLE v BRANDON HOUZE, No. 156185; Court of Appeals No. 336986.

PEOPLE v HEARNS, No. 156229; Court of Appeals No. 337618.

PEOPLE v BEAVERS, No. 156384; Court of Appeals No. 330867.

PEOPLE v BURKE, No. 156400; Court of Appeals No. 337265.

PEOPLE v PIERCEFIELD, No. 156488; Court of Appeals No. 337916.

PEOPLE v TRUITTE, No. 156527; Court of Appeals No. 338322.

PEOPLE v PEARSON, No. 156534; Court of Appeals No. 337742.

PEOPLE v YATES, No. 156540; Court of Appeals No. 332520.

PEOPLE v BENFORD, No. 156548; Court of Appeals No. 338987.

PEOPLE v TOSHI WILLINGHAM, No. 156571; Court of Appeals No. 331267.

PEOPLE v ERWIN THOMAS, No. 156597; Court of Appeals No. 337915.

PEOPLE v PENNY, No. 156626; Court of Appeals No. 337029.

PEOPLE v BLAIR, No. 156730; Court of Appeals No. 337536.

PEOPLE v OLIN, No. 156769; Court of Appeals No. 337939.

PEOPLE v SHEMAR CAMPBELL, No. 156786; Court of Appeals No. 338824.

PEOPLE v VERN FOUNTAIN, No. 156822; Court of Appeals No. 339690.

PEOPLE v HARTMAN, No. 156837; Court of Appeals No. 337550.

PEOPLE v PARKER, No. 156883; Court of Appeals No. 340627.

PEOPLE v CURTIS BAILEY, No. 156928; Court of Appeals No. 337816.

PEOPLE v PEREZ, No. 156940; Court of Appeals No. 338529.

PEOPLE v SCALES, No. 156941; Court of Appeals No. 334640.

PEOPLE v JEREMY CLAY, No. 156990; Court of Appeals No. 339081.

PEOPLE v RICHARD YOUNG, No. 157041; Court of Appeals No. 334113.

MCLEAN v NEXTEER AUTOMOTIVE CORPORATION, No. 157065; Court of Appeals No. 339004.

PEOPLE v FARIAS, No. 157084; Court of Appeals No. 339202.

PLUMLEY v ERICKSON RETIREMENT COMMUNITIES, No. 157096; Court of Appeals No. 332495.

ADELMAN v COMPUWARE CORPORATION, No. 157110; Court of Appeals No. 333209.

PEOPLE v ROBERSON, No. 157121; Court of Appeals No. 333786.

In re KOCH ESTATE, No. 157124; reported below: 322 Mich App 383.

In re KOCH ESTATE, No. 157128; reported below: 322 Mich App 383.

ROETKEN v ROETKEN, No. 157130; Court of Appeals No. 333029.

SCHUBERT v DEPARTMENT OF TREASURY, No. 157144; reported below: 322 Mich App 439.

PEOPLE v PALMER, No. 157155; Court of Appeals No. 339327.

CALLAHAN v MLIVE MEDIA GROUP, No. 157160; Court of Appeals No. 339573.

LEVENSON v CITY OF ANN ARBOR, No. 157167; Court of Appeals No. 336231.

PEOPLE v RODNEY ARMSTRONG, No. 157174; Court of Appeals No. 332793.

PEOPLE v HOPKINS, No. 157182; Court of Appeals No. 341063.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v MANUEL MASON, No. 157187; Court of Appeals No. 340302.

DUNCHOCK v CITY OF CORUNNA, No. 157203; Court of Appeals No. 335721.

PEOPLE v BAUGH, No. 157214; Court of Appeals No. 340935.

PEOPLE v CAMPOS, No. 157219; Court of Appeals No. 338858.

In re WARD ESTATE, No. 157228; Court of Appeals No. 335438.

PEOPLE v LAWRENCE PERSON, No. 157256; Court of Appeals No. 341040.

PEOPLE v WHITBY, No. 157258; Court of Appeals No. 334737.

PEOPLE v TUREAUD, No. 157262; Court of Appeals No. 340976.

GRANDVIEW BEACH ASSOCIATION v COUNTY OF CHEBOYGAN, Nos. 157267 and 157268; Court of Appeals Nos. 335159 and 335206.

PEOPLE v ROMAYA, No. 157271; Court of Appeals No. 339476.

PEOPLE v RULIS, No. 157273; Court of Appeals No. 339854.

NAILS v PROASSURANCE INDEMNITY COMPANY, INC, No. 157278; Court of Appeals No. 339050.

PEOPLE v BASTIEN, No. 157279; Court of Appeals No. 339195.

PEOPLE v LAMB, No. 157285; Court of Appeals No. 339599.

PEOPLE v MAJORS, No. 157286; Court of Appeals No. 338912.

STANLEY-JONES ESTATE v WEEKLEY, No. 157287; Court of Appeals No. 334619.

RUFFINS v DTE ELECTRIC COMPANY, No. 157288; Court of Appeals No. 335305.

PEOPLE v LEE, No. 157290; Court of Appeals No. 340660.

PEOPLE v LONNIE BARNES, No. 157292; Court of Appeals No. 333841. WILDER, J., did not participate.

PEOPLE v WEAVER, No. 157298; Court of Appeals No. 335691.

PEOPLE v GREENE, No. 157309; Court of Appeals No. 341253.

PEOPLE v ADAIRE EVANS, No. 157314; Court of Appeals No. 334628.

PEOPLE v MCCOMBS, No. 157322; Court of Appeals No. 340659.

PEOPLE v TORION CHANDLER, No. 157326; Court of Appeals No. 333476.

PEOPLE v ADRIAN PERSON, No. 157331; Court of Appeals No. 335219.

PEOPLE v BRADFORD, No. 157361; Court of Appeals No. 339492.

PEOPLE v SWOPE, No. 157362; Court of Appeals No. 334887.

PEOPLE v CONWELL, No. 157364; Court of Appeals No. 341569.

PEOPLE v ARDRA YOUNG, No. 157365; Court of Appeals No. 339862. On order of the Court, the application for leave to appeal the January 24, 2018 order of the Court of Appeals is considered, and it is denied. The Court notes that, although the defendant's motion has been styled as a motion for relief from judgment under subchapter 6.500 by the Wayne Circuit Court, it should not be regarded as a motion for relief from judgment for purposes of MCR 6.502(G)(1) in any future case. The defendant actually filed a motion under MCR 2.612, which was properly denied by the trial court, but due to a lack of merit, and not under the rules of MCR 6.501 *et seq*.

PEOPLE v LAPINE, No. 157367; Court of Appeals No. 339285.

PEOPLE v RAMON CALDWELL, No. 157371; Court of Appeals No. 334322.

PEOPLE v DEANDRE ARNOLD, No. 157376; Court of Appeals No. 333492.

PEOPLE v DAVID JOHNSON, No. 157383; Court of Appeals No. 339568.

PEOPLE v WILDER, No. 157384; Court of Appeals No. 339764.

PEOPLE v JEROME KELLY, No. 157386; Court of Appeals No. 340584.

PEOPLE v HARDRICK, Nos. 157400 and 157401; Court of Appeals Nos. 341669 and 341673.

PEOPLE v MEDINA-RODRIGUEZ, No. 157410; Court of Appeals No. 341298.

PEOPLE v DENTON, No. 157418; Court of Appeals No. 340066.

CURTIS v AUTO CLUB INSURANCE ASSOCIATION, No. 157423; Court of Appeals No. 339843.

PEOPLE v WYNGARDEN, No. 157426; Court of Appeals No. 339743.

PEOPLE v NATHANIEL EVANS, No. 157428; Court of Appeals No. 340065.

WARD v MACOMB CORRECTIONAL FACILITY WARDEN, No. 157435; Court of Appeals No. 339639.

PEOPLE v ROACH, No. 157436; Court of Appeals No. 342347.

PEOPLE v LOUKAS, No. 157440; Court of Appeals No. 340051.

PEOPLE v VANRHEE, No. 157444; Court of Appeals No. 342392.

ADLER STILMAN, PLLC v OAKWOOD HEALTHCARE, INC, No. 157446; Court of Appeals No. 333538.

PEOPLE v RYAN, No. 157486; Court of Appeals No. 335516.

PEOPLE v MICHAEL MATTHEWS, No. 157499; Court of Appeals No. 336121.

IONIA COUNTY INTERMEDIATE EDUCATION ASSOCIATION v IONIA COUNTY INTERMEDIATE SCHOOL DISTRICT, No. 157501; Court of Appeals No. 334573.

PEOPLE v FRENCH, No. 157510; Court of Appeals No. 341799.

PEOPLE v DOUGLAS HARPER, No. 157514; Court of Appeals No. 341773.

TIPOU v MARSH, Nos. 157520 and 157521; Court of Appeals Nos. 334588 and 335368.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v WISE, No. 157525; Court of Appeals No. 341928.

WIDNER v TRAVELERS INSURANCE COMPANY, No. 157534; Court of Appeals No. 339977.

PEOPLE v ROBERT CARTER, No. 157539; Court of Appeals No. 336265.

PEOPLE v MICHAEL GARRETT, No. 157544; Court of Appeals No. 341352.

SPREITZER v HUTCHISON, No. 157545; Court of Appeals No. 335414.

PEOPLE v ALBARATI, No. 157549; Court of Appeals No. 334169.

PEOPLE v ANTONIO BANKS, No. 157562; Court of Appeals No. 341954.

PEOPLE v GUY SHELTON, No. 157567; Court of Appeals No. 341577.

PEOPLE v KENDELL HOUZE, No. 157574; Court of Appeals No. 342151.

CAN IV PACKARD SQUARE LLC v PACKARD SQUARE LLC, No. 157575; Court of Appeals No. 335512.

PEOPLE OF MERIDIAN TOWNSHIP v BANAS, No. 157576; Court of Appeals No. 338289.

BAKER v MARSHALL, No. 157583; reported below: 323 Mich App 590.

PEOPLE v LANDERS, No. 157641; Court of Appeals No. 336698.

PEOPLE v CASANOVA, No. 157647; Court of Appeals No. 324819.

HOLLAND v KRAATZ, No. 157650; Court of Appeals No. 336808.

PEOPLE v METCALF, No. 157657; Court of Appeals No. 333978.

THOMAS v DOLLAR GENERAL CORPORATION, No. 157660; Court of Appeals No. 337013.

PEOPLE v STOKES, No. 157662; Court of Appeals No. 342220.

PEOPLE v GUTZMAN, No. 157669; Court of Appeals No. 342664.

PEOPLE v HARRY NELSON, No. 157678; Court of Appeals No. 335374.

PEOPLE v DEGROOT, No. 157681; Court of Appeals No. 342341.

PEOPLE v DELAMIELLEURE, No. 157684; Court of Appeals No. 333633.

PEOPLE v MIA WARREN, No. 157697; Court of Appeals No. 342626.

PEOPLE v VASQUEZ, No. 157699; Court of Appeals No. 342114.

PEOPLE v CANN, No. 157707; Court of Appeals No. 334950.

PEOPLE v ROY THOMPSON, No. 157710; Court of Appeals No. 337234.

PEOPLE v TRAVIS CAMPBELL, No. 157719; Court of Appeals No. 342228.

PEOPLE v GLOVER, No. 157720; Court of Appeals No. 334631.

PEOPLE v BYRNES, Nos. 157726 and 157727; Court of Appeals Nos. 341377 and 341380.

SOUTHFIELD NEIGHBORHOOD REVITALIZATION INITIATIVE LLC v OYEKANMI, No. 157737; Court of Appeals No. 339992.

MANDUJANO v GUERRA, No. 157767; Court of Appeals No. 336802.

PEOPLE v MARKEITH JONES, No. 157786; Court of Appeals No. 342329.

PEOPLE v MCAFEE, No. 157819; Court of Appeals No. 341612.

PEOPLE v DRAKILE JONES, No. 157826; Court of Appeals No. 334635.

PEOPLE v WINSTON EVANS, No. 157832; Court of Appeals No. 337831.

PEOPLE v ELAMIN MUHAMMAD, No. 158133; Court of Appeals No. 338300.

Superintending Control Denied September 12, 2018:

GUZALL v ATTORNEY GRIEVANCE COMMISSION, No. 155499.

BRADLEY v ATTORNEY GRIENVANCE COMMISION, No. 157475.

Reconsideration Denied September 12, 2018:

PEOPLE v JESSIE GREEN, No. 156396; Court of Appeals No. 337063. Leave to appeal denied at 501 Mich 1080.

PEOPLE v RICHEY, No. 156397; Court of Appeals No. 337073. Leave to appeal denied at 501 Mich 1080.

PEOPLE v LAVARON MORRIS, No. 156438; Court of Appeals No. 338053. Leave to appeal denied at 501 Mich 1081.

PEDERSON v MEIJER STORES, INC, No. 156475; Court of Appeals No. 328855. Leave to appeal denied at 501 Mich 1090.

PEOPLE v MURRELL, No. 156699; Court of Appeals No. 339439. Leave to appeal denied at 501 Mich 1060.

MCADOO v CITY OF LUDINGTON, No. 156706; Court of Appeals No. 338866. Leave to appeal denied at 501 Mich 1061.

ALLSTATE INSURANCE COMPANY v AUTO CLUB INSURANCE ASSOCIATION and ALLSTATE INSURANCE COMPANY v HARRIS, No. 156773; Court of Appeals No. 338895. Leave to appeal denied at 502 Mich 901.

JON JON'S, INC v CITY OF WARREN, No. 156868; Court of Appeals No. 332504. Leave to appeal denied at 501 Mich 1082.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v ANTHONY DEAN JONES, Nos. 157106 and 157107; Court of Appeals Nos. 333572 and 335157. Leave to appeal denied at 501 Mich 1093.

PEOPLE v AMSDILL, No. 157231; Court of Appeals No. 334572. Leave to appeal denied at 501 Mich 1083.

LEAPHART v STATE OF MICHIGAN, No. 157529; Court of Appeals No. 343136. Leave to appeal before decision by the Court of Appeals denied at 502 Mich 905.

Application for Leave to Appeal Dismissed September 12, 2018:

WHITE v SOUTHEAST MICHIGAN SURGICAL HOSPITAL, No. 157197; Court of Appeals No. 339587. On order of the Court, the application for leave to appeal the November 15, 2017 order of the Court of Appeals and the defendant's motion to dismiss are considered. The defendant's motion to dismiss is granted and the application is dismissed, because the plaintiff is a vexatious litigator under MCR 7.316(C)(3). We direct the Clerk of this Court not to accept any further filings from the plaintiff in this matter unless the plaintiff has obtained leave and has submitted the filing fee required by MCR 7.319. The plaintiff's motion to waive fees is denied.

WHITE v MATTHEWS, No. 157199; Court of Appeals No. 340482. On order of the Court, the application for leave to appeal the November 15, 2017 order of the Court of Appeals and the defendants' motion to dismiss are considered. The defendants' motion to dismiss is granted and the application is dismissed, because the plaintiff-appellant is a vexatious litigator under MCR 7.316(C)(3). We direct the Clerk of this Court not to accept any further filings from the plaintiff-appellant in this matter unless the plaintiff-appellant has obtained leave and has submitted the filing fee required by MCR 7.319. The plaintiff's motion to waive fees is denied.

PEOPLE v SELMAN, No. 157656; Court of Appeals No. 333484. On order of the Court, having received notice that the defendant-appellant died during the pendency of this appeal, the application for leave to appeal the March 1, 2018 judgment of the Court of Appeals is dismissed. See *People v Peters*, 449 Mich 515 (1995).

Leave to Appeal Denied September 13, 2018:

In re PUCKETT, No. 158313; Court of Appeals No. 341869.

PEOPLE v STOLTZ, No. 158326; Court of Appeals No. 344983.

Summary Disposition September 24, 2018:

PEOPLE v WORTHINGTON, No. 153209; Court of Appeals No. 330148. By order of October 5, 2016, the application for leave to appeal the January 6, 2016 order of the Court of Appeals was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). On order of the Court, the case having been decided on June 23, 2017, 500 Mich 278 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the June 4, 2015 amended judgment of sentence, and we remand this case to the Calhoun Circuit Court to reinstate the May 15, 2015 judgment of sentence. In *Comer*, we held that correcting an invalid sentence by adding a statutorily mandated term is a substantive correction that a trial court may make on its own initiative only before judgment is entered. In this case, the trial court did not have authority to amend the judgment of sentence after entry to add a provision for consecutive sentencing under MCL 768.7a(2). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

VIVIANO, J. (*concurring*). In this case, defendant was erroneously given a concurrent sentence when the relevant statute, MCL 768.7a(2), actually required a consecutive sentence. The circuit court sua sponte amended its judgment of sentence to correct this error. However, in *People v Comer*, 500 Mich 278 (2017), we held that trial courts do not have authority to sua sponte amend an invalid sentence under

MCR 6.429 or MCR 6.435.[1] Accordingly, in the instant case, the Court today vacates the circuit court's amendment as impermissible under *Comer*.

The dissent, in arguing against this result, raises and develops two arguments that the prosecutor has not addressed: (1) that the erroneously imposed concurrent sentence was a mere clerical error that the circuit court could correct "on its own initiative" under MCR 6.435(A); and (2) that, even if the circuit court lacked authority to amend the judgment sua sponte, the prosecutor should be given another chance to file a motion to amend the judgment because the circuit court's amendment came "a mere 20 days" after the original judgment was issued. But it is not our role to find and develop unpreserved arguments on behalf of litigants. See *Carducci v Regan*, 230 US App DC 80, 86 (1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). For this reason, I would decline to reach these issues and I concur in the Court's order.[2]

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[1] MCR 6.429(A) has since been amended, effective September 1, 2018, and now provides that "[t]he court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard," as long as the correction "occur[s] within 6 months of the entry of the judgment of conviction and sentence."

[2] The dissent's assertion that defendant did not preserve the *Comer* issue is puzzling. In his application for leave to appeal, defendant argued that "[a] trial court may correct an invalid sentence, but may not modify a sentence after it has been imposed except as provided by law. MCR 6.429(A)[.]" In *Comer*, which was decided after defendant's application was filed, we addressed whether a trial court has the authority to correct an invalid sentence on its own initiative after judgment on that sentence has entered. After considering both MCR 6.435 (the general rule regarding a court's ability to correct mistakes in judgments and orders) and MCR 6.429 (the specific rule discussing the court's ability to correct an invalid sentence), we concluded "that the trial court's authority to correct an invalid sentence on its own initiative ends upon entry of the judgment of sentence." *Comer*, 500 Mich at 297. While defendant here sought resentencing, our subsequent opinion in *Comer* makes it clear that the appropriate relief in these circumstances is reinstatement of the original judgment of sentence. See *id*. at 301. Far from raising a new issue on defendant's behalf, then, the majority merely grants defendant the relief mandated by *Comer* for the error that he asserted—i.e., that his "sentence was improperly changed from a concurrent sentence to a consecutive one by way of a judgment of sentence dated 6-3-15." The dissent, by contrast, raises new theories and would grant relief that was not requested on an issue that was not even briefed by the prosecutor on appeal.

ZAHRA, J. (*dissenting*). I respectfully dissent. Defendant pleaded no contest to receiving and concealing stolen property between $1,000 and $20,000, MCL 750.535, as a fourth-offense habitual offender, with an agreed-upon cap on the minimum sentence of 24 months. The presentence investigation report (PSIR) indicated that consecutive sentencing was mandatory because defendant was on parole when he committed this offense. MCL 768.7a(2); see also *People v Miles*, 454 Mich 90, 99-100 (1997). At the sentencing hearing on May 15, 2015, the trial court asked the parties whether they had reviewed the PSIR. Responding to the question whether defense counsel had any changes, deletions, or corrections to the body of the report, he answered, "No, ma'am."

In accordance with the plea agreement, defendant was sentenced to a prison term of 24 months to 15 years. The judgment of sentence filed on May 15, 2015, did not contain a checkmark in the space provided for consecutive sentencing. That portion of the judgment was left blank, and the form states, "If this item is not checked, the sentence is concurrent." Within 13 business days, the circuit court must have recognized its mistake, and it sua sponte issued an amended order dated June 4, 2015, indicating that defendant's sentence had to be served consecutively to his current sentence.

In *People v Comer*, 500 Mich 278, 297 (2017), this Court concluded that "MCR 6.429 authorizes either party to seek correction of an invalid sentence upon which judgment has entered, but the rule does not authorize a trial court to do so sua sponte." When considering MCR 6.435 and MCR 6.429 together, we concluded "that the trial court's authority to correct an invalid sentence on its own initiative ends upon entry of the judgment of sentence." *Comer*, 500 Mich at 297.

In this case, all outward appearances suggest a simple *clerical mistake* was made in filling out the May 15, 2015 judgment of sentence. Unlike in *Comer*, in which the parties did not contend that the failure to sentence defendant to lifetime electronic monitoring was a clerical mistake, here all evidence points precisely to this being a mere clerical mistake. The PSIR, which the attorneys approved and accepted, plainly indicated that sentencing had to be consecutive. There is nothing in the record to suggest that anyone ever disagreed with the notion that defendant's new sentence was to be served consecutively to his old one. Indeed, even the register of actions indicated that the May 15, 2015 judgment of sentence had provided for consecutive sentencing. Hence, the trial court's amended judgment of sentence merely fixed a "clerical mistake . . . arising from oversight or omission," which the trial court was allowed to correct on its own initiative under MCR 6.435(A). Accordingly, I would simply deny defendant's application.

Further, it should be pointed out that the trial court fixed its mistake very early in the process, a mere 20 days after the original judgment of sentence was entered. By fixing its mistake so early, the trial court in practice arguably *foreclosed* any real opportunity by the prosecution to seek correction of the May 15, 2015 judgment of sentence. Had the trial court not acted sua sponte, a timely motion to correct the judgment of sentence could have been filed under MCR 6.429(B). Defendant did not file his application for leave to appeal until December 1, 2015. MCR

6.429(B)(3) states, "If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence." In this case, given that the trial court issued its amended judgment of sentence a mere 20 days after issuing the original judgment of sentence, there was no reason for the prosecution to exercise its option to file a timely motion to correct sentence. Therefore, alternatively, I would remand and indicate that the prosecution shall be afforded the opportunity under the court rule to file a motion to correct the invalid sentence, which, but for the trial court's actions in promptly amending the judgment of sentence, the prosecution could have filed pursuant to MCR 6.429(B)(3).

Moreover, even assuming that the error is not clerical and that the trial court foreclosed any chance for the prosecution to seek correction of the judgment of sentence under MCR 6.429(B), I disagree with the majority's chosen remedy to reinstate the very sentence it properly concluded was invalid. Instead of reinstating an invalid sentence that is predicated on an ostensibly invalid plea, I would conclude that the appropriate remedy in this case is to "give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea." MCR 6.310(C); cf. *People v Cobbs*, 443 Mich 276 (1993).[1]

WILDER, J., joins the statement of ZAHRA, J.

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[1] The concurring Justice's statement is misguided and undermines the notion of equal justice under law to each litigant. He maintains that "[f]ar from raising a new issue on defendant's behalf, then, *the majority merely grants defendant the relief mandated by* Comer *for the error that he asserted*[.]" To avoid any mischaracterization of defendant's argument, the following represents defendant's entire argument in both his application to the Court of Appeals and his application to this Court:

> Defendant's sentence was improperly changed from a concurrent sentence to a consecutive one by way of a judgment of sentence dated 6-3-15. See attached, both judgments. This was incorrect. Even where a court is required to impose a mandatory consecutive sentence (here, because Mr. Worthington was on parole at the time he committed the instant offense, MCL 76.8.7a [sic]), if such a sentence was imposed concurrently in error, it may only be corrected by full resentencing. A trial court may correct an invalid sentence, but may not modify a sentence after it has been imposed except as provided by law. MCR 6.429(A); *People v Catanzarite*, 211 Mich App 573, 582 (1995); *People v Miles*, 454 Mich 90 (1997).
>
> In *People v Thomas*, 223 Mich App 9, 16 (1997), the Court of Appeals held that where a judge misperceives the law and imposes a concurrent sentence where the law requires a consecutive one, resentencing is the only appropriate way to correct the error. It noted that MCR 6.429(A) allows for correction of sentences, but is silent as to the manner in which this must be done.

In re DRONES, No. 158063; Court of Appeals No. 340091. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment that addressed the proper interpretation of MCL 712A.19b(3)(k), for the reason that the court's analysis on that issue was unnecessary to the disposition of the case. The trial court erred by failing to determine, on the basis of legally admissible evidence, whether the statutory grounds for termination of the respondent's parental rights were proved by clear and convincing evidence. MCR 3.977(E)(3). Therefore, reversal of the trial court and remand for a new termination hearing was appropriate on that basis alone, and the Court of Appeals need not have addressed any further issues. We remand this case to the Family Division of the Muskegon Circuit Court for the proceedings ordered by the Court of Appeals—"a new hearing on whether there are statutory grounds to terminate respondent's parental rights." We do not retain jurisdiction.

> Accordingly, the long-standing remedy of resentencing is the appropriate one. Further, due process requires a defendant to have the opportunity to have meaningful notice and opportunity to address the court if a previously imposed sentence is to be changed. *Id*. See also, *People v Mapp*, 224 Mich App 431 (1997) (same).
>
> For the above reasons, Mr. Worthington is entitled to resentencing.

Thus, this Court here does not "merely grant[] defendant the relief mandated by *Comer* for the error that he asserted[.]" Defendant sought to be resentenced. Defendant will not be resentenced. Defendant certainly did not seek to "reinstate" the May 15, 2015 judgment of sentence. Nor is there any hint within defendant's entire argument that "when considering MCR 6.435 and MCR 6.429 together, . . . the trial court's authority to correct an invalid sentence on its own initiative ends upon entry of the judgment of sentence." *Comer*, 500 Mich at 297. Accordingly, it was this Court, in abeying the instant case in light of the pending decision in *Comer*, that raised and developed the theory that now grants defendant relief in this case. Simply put, this Court's unanimous decision to abey the instant case for *Comer* invited every Justice of this Court to engage in a plenary review of the court rules being interpreted in *Comer*, particularly MCR 6.435. Having specifically directed the parties in *Comer* to address MCR 6.429 and MCR 6.435, any Justice of this Court is permitted to examine the relevant court rules in the cases that we abeyed for *Comer*, and in fact, I would suggest that we are obligated to do so by our oaths of office. Last, the concurring Justice's reliance on language from then Judge Scalia's opinion in *Carducci v Regan*, 230 US App DC 80 (1983), is so far removed from the context of this case that it can only be explained as a curious but fallacious appeal to authority.

Leave to Appeal Denied September 24, 2018:

PEOPLE v JAHAN GREEN, No. 157429; Court of Appeals No. 332835.

In re MARION, No. 158222; Court of Appeals No. 341428.

Summary Disposition September 27, 2018:

GRABINSKI v GOVERNOR, No. 156439; Court of Appeals No. 339082. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *In re Jackson*, Court of Appeals Docket No. 339724, which we remanded to the Court of Appeals by order dated August 3, 2018. After *In re Jackson* is decided, the Court of Appeals shall reconsider its dismissal of the plaintiff's application for leave to appeal in light of its ruling in *In re Jackson*.

PEOPLE v JEREMIAH DEWEY, No. 156968; Court of Appeals No. 340063. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's delayed application for leave to appeal as having been filed within the deadline set forth in MCR 7.205(G)(3) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(E)(2). The defendant made a timely request for the appointment of appellate counsel but, through no fault of his own, counsel was not appointed. Accordingly, the defendant was deprived of his right to file an application for leave to appeal. We do not retain jurisdiction

KURASHIGE v UNIVERSITY OF MICHIGAN, No. 158173; Court of Appeals No. 344559. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

BERNSTEIN, J., did not participate due to a familial relationship with a person associated with the case.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered September 27, 2018:

PEOPLE v SWILLEY, No. 154684; Court of Appeals No. 325806. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether it is reasonably likely that the trial court's questioning of witnesses improperly influenced the jury by creating the appearance of advocacy or partiality against a party. See *People v Stevens*, 498 Mich 162 (2015). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the

appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

PEOPLE v THORPE, No. 156777; Court of Appeals No. 332694. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the trial court abused its discretion by allowing expert testimony on redirect about the rate of false reports of sexual abuse by children, see *People v Peterson*, 450 Mich 349 (1995), in order to rebut testimony elicited on cross-examination that children can lie and manipulate; and, if so, (2) whether the error was harmless. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Harbison* (Docket No. 157404).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

KOSTADINOVSKI v HARRINGTON, No. 156850; reported below: 321 Mich App 736. The parties shall file supplemental briefs within 42 days of the date of this order addressing the issues raised in the primary appeal and the cross-appeal, including how, consistent with MCL 600.2912b, a plaintiff in a medical malpractice case may amend the complaint to include newly discovered claims against an existing defendant. In addition, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). Each party may file a response brief within 14 days of being served with the other party's initial supplemental brief. Additionally, at this time, the appellees/cross-appellants shall electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., and the Negligence Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

VIVIANO, J., not participating due to a familial relationship with the presiding circuit court judge in this case.

Leave to Appeal Denied September 27, 2018:

NASH v CITY OF GRAND HAVEN, No. 156804; reported below: 321 Mich App 587.

MURPHY v CITY OF DETROIT, No. 157132; Court of Appeals No. 339834.

PARKMAN v ENTERPRISE LEASING COMPANY OF DETROIT, LLC, No. 157437; Court of Appeals No. 335240.

PEOPLE v SPAGNOLA, No. 157686; Court of Appeals No. 330382.

Reconsideration Denied September 27, 2018:

PEOPLE v RONALD FOSTER, No. 156088; Court of Appeals No. 336811. Summary disposition order entered at 501 Mich 1024.

Order Directing Supplemental Briefing Entered September 28, 2018:

MICHIGAN OPPORTUNITY v BOARD OF STATE CANVASSERS, No. 158303; Court of Appeals No. 344619. On order of the Court, the motion to expedite is granted. The application for leave to appeal the August 22, 2018 order of the Court of Appeals is considered. In light of the Legislature's enactment of the Michigan One Fair Wage proposal under Const 1963, art 2, § 9, see 2018 IL 4, we direct the parties to file supplemental briefs, within 28 days of the date of this order, addressing whether the plaintiff's application for leave to appeal presents a justiciable issue. The parties shall specifically address: (1) whether the plaintiff's complaint for mandamus is moot, see *Gildemeister v Lindsay*, 212 Mich 299 (1920); and (2) in any event, whether the plaintiff, as a ballot question committee under the Michigan Campaign Finance Act, MCL 169.201 *et seq*., has standing to challenge the constitutionality of a law enacted by the Legislature under Const 1963, art 2, § 9. The application for leave to appeal remains pending.

Leave to Appeal Denied September 28, 2018:

PEOPLE v VANDIVER, No. 155503; Court of Appeals No. 335735.

PEOPLE v OLGER, Nos. 156200 and 156201; Court of Appeals Nos. 331705 and 331876.

PEOPLE v LAFAYETTE, No. 156593; Court of Appeals No. 337019.

RUSS v MICHIGAN ASSIGNED CLAIMS FACILITY, No. 156623; Court of Appeals No. 334565.

LANCASTER & YORK, LLC v OAKLAND COUNTY TREASURER, No. 156818; Court of Appeals No. 333064.

HARRIS v GREEKTOWN SUPERHOLDINGS, INC and SEIFMAN v GUZALL, No. 156898; Court of Appeals No. 331652.

SILAS v SECURA INSURANCE COMPANIES, No. 157011; Court of Appeals No. 331169.

PEOPLE v TRAVIS MAY, No. 157080; Court of Appeals No. 340295.

HARRIS v OAKWOOD HEALTHCARE, INC, No. 157092; Court of Appeals No. 333389.

WHEATLEY v DEPARTMENT OF CORRECTIONS, No. 157129; Court of Appeals No. 338197.

PEOPLE v DEREONTAE FOSTER, No. 157173; Court of Appeals No. 340709.

PEOPLE v LONG, No. 157196; Court of Appeals No. 332900.

PEOPLE v HASTINGS, No. 157295; Court of Appeals No. 335584.

WIEGAND v YAMASAKI, No. 157430; Court of Appeals No. 334598.

FLINT v SWEETIN, No. 157655; Court of Appeals No. 340043.

Leave to Appeal Denied October 1, 2018:

MCNA INSURANCE COMPANY v DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET, No. 158450; Court of Appeals No. 342646.

Summary Disposition October 2, 2018:

TD AUTO FINANCE, LLC v STATE TREASURER, No. 157317; Court of Appeals No. 335269. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Claims for reconsideration in light of *Ally Fin, Inc v State Treasurer*, 502 Mich 484 (2018). We do not retain jurisdiction.

PEOPLE v ANTHONY GATES, No. 157378; Court of Appeals No. 340041. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the March 7, 2017 order of the Calhoun Circuit Court stating, "Defendant is again instructed that, pursuant to MCR 6.502(G), he is unable to file additional Motions for Relief from Judgment and any successive motions sent to the 37th Circuit Court will be returned without being filed." Motions that do not substantially comply with the requirements of the court rules and successive motions for relief from judgment may be returned to the defendant under certain conditions. MCR 6.502(D); MCR 6.502(G)(1). But a defendant may file a second or subsequent motion for relief from judgment based on a retroactive change in law or a claim of new evidence. MCR 6.502(G)(2). In all other respects, leave to appeal is denied. The motion to remand is denied.

PEOPLE v DOUGLAS JACKSON, No. 157835; Court of Appeals No. 342075. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the March 29, 2018 order of the Court of Appeals and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *In re Jackson* (Court of Appeals Docket No. 339724). After *In re Jackson* is decided, the Court of Appeals shall reconsider the defendant's application for leave to appeal, including whether it is necessary to remand this case to the Wayne Circuit Court for a ruling on the defendant's December 9, 2016 motion for reconsideration. The motions for appointment of counsel, to compel production of documents, to make video recordings available, and for additions are denied.

Leave to Appeal Denied October 2, 2018:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, No. 154434; reported below: 317 Mich App 97.

PEOPLE v FETTE, No. 155003; Court of Appeals No. 333217.

PEOPLE v BIFFLE, No. 155714; Court of Appeals No. 336989.

PEOPLE v HOLMES, No. 156047; Court of Appeals No. 336318.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BRIAN FOSTER, No. 156059; Court of Appeals No. 337196.

PEOPLE v RICKEY WHITE, No. 156104; Court of Appeals No. 336867.

PEOPLE v HENRY, No. 156119; Court of Appeals No. 337018.

PEOPLE v ERROLL THOMAS, No. 156124; Court of Appeals No. 337649.

PEOPLE v ROBERT CALDWELL, No. 156260; Court of Appeals No. 336753.

PEOPLE v JASON ROSE, No. 156322; Court of Appeals No. 337561.

PEOPLE v JEFFREY HOGAN, No. 156796; Court of Appeals No. 332966.

PEOPLE v LOFTIS, No. 156840; Court of Appeals No. 338902.

PEOPLE v STEVEN BROWN, No. 156916; Court of Appeals No. 340012.

DUFFY v KINNAMON, No. 156924; Court of Appeals No. 333578.

PEOPLE v BISHOP, No. 156935; Court of Appeals No. 339124.

PEOPLE v BARROSO, No. 156967; Court of Appeals No. 338469.

PEOPLE v DELAGARZA, No. 156969; Court of Appeals No. 338391.

PEOPLE v DEMARIO BUCHANAN, No. 156974; Court of Appeals No. 339901.

PEOPLE v COLE, No. 156976; Court of Appeals No. 340809.

PEOPLE v HANCOCK, No. 156985; Court of Appeals No. 340325.

PEOPLE v POWELL, No. 156987; Court of Appeals No. 338479.

PEOPLE v ARELLANO, No. 156988; Court of Appeals No. 339319.

PEOPLE v GILBERT MARTINEZ, No. 156996; Court of Appeals No. 338833.

PEOPLE v WELCH, No. 157005; Court of Appeals No. 340834.

PEOPLE v CRANE, No. 157010; Court of Appeals No. 340220.

PEOPLE v DORSETTE, No. 157019; Court of Appeals No. 341030.

PEOPLE v LOMAX, No. 157020; Court of Appeals No. 340744.

PEOPLE v MALONE, No. 157031; Court of Appeals No. 340299.

PEOPLE v CHARLES, No. 157038; Court of Appeals No. 339407.

PEOPLE v STRANDBERG, No. 157093; Court of Appeals No. 340769.

PEOPLE v ANTHONY THOMPSON, No. 157112; Court of Appeals No. 340412.

PRICE v TRUMBULL INSURANCE COMPANY, No. 157136; Court of Appeals No. 339363.

PEOPLE v BIGFORD, No. 157151; Court of Appeals No. 333493.

PEOPLE v THORNE, No. 157180; reported below: 322 Mich App 340.

PEOPLE v LOUIS CHANDLER, No. 157202; Court of Appeals No. 329605.

BROWNLOW v MCCALL ENTERPRISES, INC, No. 157247; Court of Appeals No. 339006.

PEOPLE v MCLEAN, No. 157272; Court of Appeals No. 334153.

PEOPLE v COGER, No. 157275; Court of Appeals No. 340365.

NASEMAN v EGGLESTON, No. 157325; Court of Appeals No. 339479.

SWEENEY v VISALUS, INC, No. 157330; Court of Appeals No. 334509.

NASEMAN v RAVEN, No. 157354; Court of Appeals No. 339480.

PEOPLE v KEVIN MOORE, No. 157385; Court of Appeals No. 341536.

PEOPLE v BATES, No. 157393; Court of Appeals No. 340436.

PEOPLE v MCINTYRE, No. 157396; Court of Appeals No. 333283.

PEOPLE v KEVIN JOHNSON, No. 157406; Court of Appeals No. 340229.

PEOPLE v WREN, No. 157425; Court of Appeals No. 340997.

HURON CITY COMPANY v PARCELLS, No. 157433; Court of Appeals No. 335978.

PEOPLE v RUMPF, No. 157448; Court of Appeals No. 333544.

PEOPLE v TILLMAN, No. 157459; Court of Appeals No. 340864.

PEOPLE v CENTER, No. 157464; Court of Appeals No. 340510.

PEOPLE v JARVON BROWN, No. 157483; Court of Appeals No. 340300.

PEOPLE v FARROW, No. 157490; Court of Appeals No. 339361.

PEOPLE v MCDONALD, No. 157498; Court of Appeals No. 341776.

PEOPLE v MONIZ, No. 157513; Court of Appeals No. 340768.
WILDER, J., did not participate.

PEOPLE v EDWARD BROOKS, No. 157535; Court of Appeals No. 341141.

PEOPLE v JAMES MULHOLLAND, No. 157659; Court of Appeals No. 335078.

PEOPLE v SANDERS, No. 157671; Court of Appeals No. 341635.

PEOPLE v BOOSE, No. 157677; Court of Appeals No. 342472.

PEOPLE v THOMAS MULHOLLAND, No. 157682; Court of Appeals No. 335218.

PEOPLE v GENEKE LYONS, No. 157685; Court of Appeals No. 334513.

MCDONALD v WEST BRANCH REGIONAL MEDICAL CENTER, No. 157704; Court of Appeals No. 338487.

PEOPLE v MARCELL DAVIS, No. 157706; Court of Appeals No. 342763.

PEOPLE v HARDING, No. 157725; Court of Appeals No. 335213.

PEOPLE v ISOM, No. 157732; Court of Appeals No. 342312.

DOE v DEPARTMENT OF TRANSPORTATION, No. 157739; Court of Appeals No. 341277.

PEOPLE v KENT, No. 157743; Court of Appeals No. 336245.

PEOPLE v LENT, Nos. 157745 and 157746; Court of Appeals Nos. 342683 and 342686.
VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

HALE v DEPARTMENT OF CORRECTIONS, No. 157751; Court of Appeals No. 339831.

PEOPLE v PRUITT, No. 157752; Court of Appeals No. 342145.

PEOPLE v CARROLL, No. 157764; Court of Appeals No. 342734.

PEOPLE v BORG, No. 157772; Court of Appeals No. 342403.

PEOPLE v AURIEN BROWN, No. 157777; Court of Appeals No. 334779.

BECK v ALPINE SHREDDERS LIMITED, No. 157781; Court of Appeals No. 337595.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v BARRERA, No. 157784; Court of Appeals No. 342493.

PEOPLE v BOWMAN, No. 157785; Court of Appeals No. 342495.

PEOPLE v PENNINGTON, No. 157792; reported below: 323 Mich App 452.

GRIEVANCE ADMINISTRATOR v COHEN, No. 157795.

GRIEVANCE ADMINISTRATOR v COHEN, No. 157797.

In re PETITION OF WAYNE COUNTY TREASURER FOR FORECLOSURE, No. 157798; Court of Appeals No. 336003.

PEOPLE v SHEPLER, No. 157807; Court of Appeals No. 323979.

PEOPLE v DERRICK DAVIS, No. 157824; Court of Appeals No. 335155.

PEOPLE v BRYANT COLLIER, No. 157839; Court of Appeals No. 336025.

EDWARDS v OAKLAND COUNTY TREASURER, No. 157850; Court of Appeals No. 336682.

YUNUS v YUNUS, No. 157858; Court of Appeals No. 339716.

PEOPLE v JIM WILLIAMS, No. 157859; Court of Appeals No. 335608.

PEOPLE v STREIB, No. 157860; Court of Appeals No. 342411.

PEOPLE v ALLEN, No. 157861; Court of Appeals No. 335885.

PEOPLE v ERNEST JOHNSON, No. 157862; Court of Appeals No. 334636.

PEOPLE v KILGORE, No. 157863; Court of Appeals No. 342688.

PEOPLE v ANTONIO JENKINS, No. 157871; Court of Appeals No. 337864.

PEOPLE v REDDING, No. 157873; Court of Appeals No. 336896.

PEOPLE v SYSAK, No. 157900; Court of Appeals No. 340044.

OAKLEY v RUTAN, No. 157904; Court of Appeals No. 337546.

PEOPLE v STEPHEN FOSTER, No. 157910; Court of Appeals No. 337220.

WRIGHT v LM GENERAL INSURANCE COMPANY, No. 157943; Court of Appeals No. 338131.

PEOPLE v MCCULLOUGH, No. 157944; Court of Appeals No. 337600.

In re ROESTI, No. 157948; Court of Appeals No. 340131.

MAYS v GOVERNOR, No. 157966; Court of Appeals No. 338609.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

DOE v DEPARTMENT OF TRANSPORTATION, No. 157968; Court of Appeals No. 338999.

PEOPLE v KERBER, No. 158059; Court of Appeals No. 340663.

PEOPLE v BOWMAN, No. 158090; Court of Appeals No. 343709.

Superintending Control Denied October 2, 2018:

CRAWLEY v ATTORNEY GRIEVANCE COMMISSION, No. 157413.

Reconsideration Denied October 2, 2018:

PEOPLE v KENNETH COLVIN, No. 156627; Court of Appeals No. 339220. Leave to appeal denied at 502 Mich 901.

PEOPLE v WILLIAM STEPHENS, No. 156697; Court of Appeals No. 338516. Leave to appeal denied at 502 Mich 901.

PEOPLE v KENNETH WILSON, No. 156713; Court of Appeals No. 338626. Leave to appeal denied at 502 Mich 901.

REESE v WEINER & ASSOCIATES, PLLC, No. 156896; Court of Appeals No. 332142. Leave to appeal denied at 501 Mich 1082.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v DORREON MCBRIDE, No. 157402; Court of Appeals No. 333637. Leave to appeal denied at 502 Mich 904.

Summary Disposition October 5, 2018:

PEOPLE v MCLEAIN, No. 157366; Court of Appeals No. 341825. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the trial court properly applied MCL 333.7413(1). See *People v Lowe*, 484 Mich 718 (2009). In all other respects, leave to appeal is denied.

Rehearing Granted October 5, 2018:

In re ERWIN ESTATE, Nos. 153980 and 153981; Court of Appeals Nos. 323387 and 329264. Opinion at 503 Mich 1. On order of the Court, the motion for rehearing is considered, and it is granted, in part. We add the following sentence to the last paragraph of the majority opinion issued on July 31, 2018: "We decline to address the remaining issues presented in the application for leave to appeal because we are not persuaded that they should be reviewed by this Court."

Reconsideration Granted October 5, 2018:

PEOPLE v HEWITT-EL, No. 155239; Court of Appeals No. 332946. Leave to appeal denied at 502 Mich 907. On order of the Court, the motion for reconsideration of this Court's July 6, 2018 order is considered, and it is granted. On reconsideration, we modify our order dated July 6, 2018, so as to remand this case to the Wayne Circuit Court for consideration of the defendant's claim that he was denied the effective assistance of trial and appellate counsel with regard to the sufficiency of the evidence of his felon-in-possession of a firearm conviction and that he is therefore entitled to relief from judgment on this conviction, and deny leave to appeal in all other respects. We do not vacate any part of the order, including the dissenting statement.

Leave to Appeal Granted October 5, 2018:

In re MGR, Nos. 157821 and 157822; Court of Appeals Nos. 338286 and 340203. On order of the Court, the application for leave to appeal the February 27, 2018 judgment of the Court of Appeals is considered, and it is granted. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Appellants shall file their brief within 42 days of the date of this order addressing: (1) whether the Court of Appeals erred in determining that the trial court's decisions under Section 39 of the Adoption Code, MCL 710.39, were moot in light of the order of filiation that entered in the paternity action; and (2) whether *In re MKK*, 286 Mich App 546 (2009), should be overruled. The appellees shall file their briefs within 21 days of being served with the appellants' brief. A reply, if any, must be filed by the appellants within 14 days of being served with the respective appellee's brief.

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *In re LMB* (Docket No. 157903).

The Family Law Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in this case only and served on the parties in both cases.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 5, 2018:

In re LMB, No. 157903; Court of Appeals No. 338169. The appellants shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the Court of Appeals erred in determining that the trial court's decisions under Section 39 of the Adoption Code, MCL 710.39, were moot in light of the order of filiation that entered in the paternity action; and (2) whether *In re MKK*, 286 Mich App 546 (2009),

should be overruled. In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the respective appellee's brief. The parties should not submit mere restatements of their application papers.

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *In re MGR* (Docket Nos. 157821-2).

The Family Law Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *In re MGR* (Docket No. 157821-2) only and served on the parties in both cases.

Leave to Appeal Denied October 5, 2018:

In re GUARDIANSHIP OF DOROTHY REDD, No. 156705; reported below: 321 Mich App 398. On order of the Court, the motion to supplement the application for leave to appeal is granted. The application for leave to appeal the September 19, 2017 judgment of the Court of Appeals is considered, and it is denied as moot in light of the death of the incapacitated individual who was the subject of the guardianship at issue.

HARRISON V ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY, No. 157215; Court of Appeals No. 334083.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. After plaintiff was injured in a September 2014 accident, he sued his no-fault insurer, defendant Allstate Property & Casualty Insurance Company, for unpaid personal protection insurance (PIP) benefits including work-loss benefits. Plaintiff made various and contradictory assertions throughout discovery to sustain his claim for work-loss benefits. In particular, he stated in his interrogatory answers that he was employed by TPH Transportation Services at the time of his accident, but later acknowledged at his deposition that this was an "[i]naccurate statement" and that he had last been employed by TPH Transportation Services in 2012. Furthermore, none of his assertions concerning his income before and after the accident was corroborated; of the multiple companies that he identified as current or former employers, not *one* was able to provide any sort of proof to support his obviously exaggerated income assertions. Given these facts, the trial court, in my judgment, correctly granted summary disposition in favor of defendant on the ground that plaintiff committed fraud in seeking work-loss benefits, and the Court of Appeals erred by ruling to the

contrary. I would therefore reverse the judgment of the Court of Appeals and reinstate the trial court's ruling in favor of defendant Allstate.

Summary Disposition October 10, 2018:

VUKICH v GEICO INSURANCE COMPANY, No. 157952; Court of Appeals No. 341260. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The motion for stay is granted. Trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Leave to Appeal Denied October 12, 2018:

PEOPLE v NOBLE, No. 157277; Court of Appeals No. 341415.

PEOPLE v HALE, No. 157891; Court of Appeals No. 335396.

Summary Disposition October 17, 2018:

PEOPLE v JEREMIAH DEWEY, No. 156968; Court of Appeals No. 340063. By order of September 27, 2018, this case was remanded to the Court of Appeals to treat the defendant's delayed application for leave to appeal as having been filed within the deadline set forth in MCR 7.205(G)(3). On the Court's own motion, we vacate our order of September 27, 2018, and remand this case to the Court of Appeals as on leave granted. The defendant made a timely request for the appointment of appellate counsel but, through no fault of his own, counsel was not appointed, and the defendant was deprived of a claim of appeal. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Presque Isle Circuit Court to appoint counsel to represent the defendant in the Court of Appeals.

Summary Disposition October 19, 2018:

PEOPLE v MCKEEVER, No. 156161; Court of Appeals No. 331594. On October 10, 2018, the Court heard oral argument on the application for leave to appeal the May 25, 2017 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant. On order of the Court, the applications are again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate the defendant's conviction and sentence. Assuming, without deciding, that either the trial court or trial defense counsel was responsible for the failure of a witness to appear on the defendant's behalf, it was still incumbent upon the defendant, as the appellant, to establish at the evidentiary hearing that the witness would provide materially favorable testimony on retrial. See *People v Pickens*,

446 Mich 298, 327 (1994); *People v Ginther*, 390 Mich 436, 442-443 (1973). The defendant failed to produce the witness or otherwise establish that her anticipated testimony would be materially favorable.

Leave to Appeal Denied October 19, 2018:

JONES FAMILY TRUST v SAGINAW COUNTY LAND BANK AUTHORITY, No. 155863; Court of Appeals No. 329442. On October 10, 2018, the Court heard oral argument on the application for leave to appeal the April 20, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied.

In re GRABOWSKI, No. 158402; Court of Appeals No. 341810.

Summary Disposition October 24, 2018:

PEOPLE v ADAMOWICZ, No. 156309; Court of Appeals No. 330612. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II of the Court of Appeals judgment titled, "Ineffective Assistance of Counsel," and we reverse in part and vacate in part Part II of the Court of Appeals judgment titled, "Prosecutorial Error."

With respect to the defendant's claim of ineffective assistance of counsel, we determine that the development of a factual record is required for appellate consideration. See MCR 7.305(C)(8); MCR 7.211(C)(1)(a)(ii). With respect to the defendant's claims of prosecutorial error, contrary to the Court of Appeals' conclusion, the prosecutor erred by asking the jury to consider the defendant's "moral duty" to retreat from his own dwelling in relation to his self-defense claim. Asking a jury to consider a defendant's "moral duty" to retreat is inconsistent with the Self-Defense Act (SDA), MCL 780.971 *et seq*., legally irrelevant to such a claim, and creates a danger of confusion of the issues. See MRE 401; MRE 403. The prosecutor also erred by eliciting testimony and presenting argument regarding the defendant's retrospective assessment of his ability to retreat, where it was undisputed that the defendant had no duty to retreat. "It is universally accepted that retreat is not a factor in determining whether a defensive killing was necessary when it occurred in the accused's dwelling." *People v Riddle*, 467 Mich 116, 134 (2002). In a self-defense claim, the accused's conduct is judged according to how the circumstances appeared to him at the time he acted. See e.g., *Pond v People*, 8 Mich 150, 169 (1860). Thus, the prosecutor's questioning and argument in this regard were legally irrelevant and created a danger of confusion of the issues. See MRE 401; MRE 403. We recognize that the Court of Appeals assumed, without deciding, that the prosecutor erred and determined that the defendant had nevertheless failed to demonstrate that the errors affected the outcome of his trial. However, given the significance of the prosecutor's errors identified in this order, we vacate the Court of Appeals' prejudice analysis and remand for reconsideration of whether the prosecutorial errors constituted plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763 (1999).

On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Oakland Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the defendant was deprived of his right to the effective assistance of counsel with respect to the failure to call an expert witness and the failure to object to the prosecutor's errors identified above. At the conclusion of the hearing, the circuit court shall forward the record and its findings to the Court of Appeals, which shall then resolve the issues presented by the defendant.

In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v MATTHEW GALLOWAY, No. 156474; Court of Appeals No. 331492. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we reinstate the December 9, 2015 order of the Oakland Circuit Court ending the defendant's obligation to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The April 11, 2001 judgment of sentence specifies that the defendant is not required to register as a sex offender, and the trial court did not purport to amend that judgment. The court's October 24, 2002 order amending the order of probation to add sex offender registration as a condition of probation did not, and could not, extend the registration requirement beyond the term of probation. The authority to require compliance with SORA ended, at the very latest, after expiration of the five-year maximum period of probation that the trial court could have imposed. See *People v Marks*, 340 Mich 495, 501-502 (1954). As the April 11, 2001 judgment of sentence is the operative judgment in this case, the trial court's December 9, 2015 order properly ruled that the defendant is not required to register under SORA. The defendant is not required to file a motion for relief from judgment under MCR 6.501 *et seq*., because the order of probation has expired, and he is not seeking relief from his judgment of conviction and sentence, which provides that he is not required to comply with SORA. Regardless of the form of the defendant's motion, the trial court properly recognized the lack of authority to act contrary to the final judgment in the case.

NORTHPORT CREEK GOLF COURSE LLC v LEELANAU TOWNSHIP, No. 157007; Court of Appeals No. 337374. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals analysis stating: "Because neither respondent nor the tax tribunal has presented any analysis that petitioner is a 'user' under MCL 211.181 beyond petitioner's being a for-profit business, the tax tribunal erred in denying summary disposition to petitioner." The Tax Tribunal did not directly address this issue in the first instance. Therefore, we remand this case to the Court of Appeals for further consideration. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Tax Tribunal to conduct a hearing to answer the following questions as posed in the Court of Appeals analysis: "whether the golf course is 'used by' petitioner 'in connection with a business conducted for profit' and petitioner is the 'user of the real property.' " MCL 211.181(1). At the conclusion of the hearing, the Tax Tribunal shall

forward the record and its findings to the Court of Appeals, which shall rule on whether the petitioner is subject to tax under MCL 211.181(1) based on the record. If the Court of Appeals determines that the petitioner is subject to tax under MCL 211.181(1), the Court of Appeals shall consider the remaining issue raised by the petitioner but not addressed by that court during its initial review of this case regarding whether the petitioner is entitled to the concession exemption under MCL 211.181(2)(b). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered October 24, 2018:

JAWAD A SHAH MD, PC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 157951; reported below: 324 Mich App 182. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the anti-assignment clause in the defendant's insurance policy precludes the defendant's insured from assigning his right to recover no-fault personal protection insurance benefits to the plaintiff healthcare providers. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *W A Foote Memorial Hosp v Mich Assigned Claims Plan* (Docket No. 156622).

The Insurance Alliance of Michigan and Auto Club Insurance Association are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v MATHEWS, No. 158102; reported below: 324 Mich App 416. The appellant shall file a supplemental brief within 42 days of the date of this order, addressing whether the warnings provided to the defendant prior to custodial interrogation "reasonably convey[ed]," *Florida v Powell*, 559 US 50, 60 (2010), to her the "right to consult with a lawyer and to have the lawyer with [her] during interrogation," as required by *Miranda v Arizona*, 384 US 436, 471 (1966). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix,

or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied October 24, 2018:

PEOPLE v FREDERICK YOUNG, No. 155953; Court of Appeals No. 330135.

PEOPLE v VINSON, No. 156544; Court of Appeals No. 337894.

PEOPLE v VINCENT HUDSON, No. 157002; Court of Appeals No. 333727.

PEOPLE v CARPENTER, No. 157234; reported below: 322 Mich App 523.

GONZALEZ v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 157487; Court of Appeals No. 331956.

SMITH v FORESTER TOWNSHIP, No. 157728; reported below: 323 Mich App 146.

EARLEY v VAN HEMERT, No. 157964; Court of Appeals No. 341066.

PEOPLE v CANFIELD, No. 158025; Court of Appeals No. 340598.

WILDER, J., would order oral argument on the application for leave to appeal.

Superintending Control Granted October 26, 2018:

NICHOLS v COURT OF APPEALS, No. 156584. On order of the Court, the complaint for superintending control is considered and relief is granted in part. We direct the Court of Appeals to docket the plaintiff's June 26, 2017 Motion to Reissue Judgment in Docket No. 333395 as a motion, and to issue an order deciding the motion. We do not retain jurisdiction.

Leave to Appeal Denied October 26, 2018:

In re ALLEN, No. 158412; Court of Appeals No. 337895.

Summary Disposition October 30, 2018:

PEOPLE v MATTHEW ROBINSON, No. 156918; Court of Appeals No. 337865. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The defendant alleges new evidence in the form of (1) the full and unredacted incident report, which the defendant claims was sup-

pressed in violation of *Brady v Maryland*, 373 US 83 (1963); and (2) statements from two suspects identified in that report, including a confession from one of the suspects. Under MCR 6.502(G)(2), a defendant may file a second or subsequent motion for relief from judgment based on "a claim of new evidence that was not discovered before the first such motion." See also *People v Swain*, 499 Mich 920 (2016). We do not retain jurisdiction.

PEOPLE V GLENN ARNOLD, No. 157472; Court of Appeals No. 342534. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. Due to the unique circumstances of this case, we direct that court to treat the defendant's delayed application for leave to appeal as having been filed within the deadline set forth in MCR 7.205(G) and to decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(E)(2). The motion to remand is denied, without prejudice to the defendant's assertion of the motion in the Court of Appeals. We do not retain jurisdiction.

PEOPLE V DEREK SMITH, No. 157932; Court of Appeals No. 340991. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE V DARRELL JONES, No. 157987; Court of Appeals No. 343621. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of (1) whether the prosecutor breached an agreement with the defendant to take no position regarding a specific sentence within a sentencing range when the prosecutor recommended a sentence "at the top end of his Guidelines," and, if so, (2) whether the error violates due process and requires resentencing. In all other respects, leave to appeal is denied.

Leave to Appeal Denied October 30, 2018:

PEOPLE V THYRONE EVANS, No. 154754; Court of Appeals No. 324460.

PEOPLE V QUAMAIN LEAK, No. 155004; Court of Appeals No. 327336.

WOODLEY V IONIA CORRECTIONAL FACILITY WARDEN, No. 156589; Court of Appeals No. 338608.

PEOPLE V MICHAEL BROWN, No. 156909; Court of Appeals No. 334089.

PEOPLE V KRIS KEYES, No. 156944; Court of Appeals No. 334708.

PEOPLE V GIUCHICI, No. 156966; Court of Appeals No. 339041. The Court notes that, although the defendant's motion has been styled as a motion for relief from judgment under subchapter 6.500 by the Lapeer Circuit Court, it should not be regarded as a motion for relief from judgment for purposes of MCR 6.502(G)(1) in any future case. The

defendant actually filed a motion under MCR 2.612, which was properly denied by the trial court, but due to a lack of merit, and not under the rules of MCR 6.501 *et seq*.

PEOPLE v BOBBY KEYES, No. 157022; Court of Appeals No. 334689.

ALLEN v CHARLEVOIX ABSTRACT & ENGINEERING COMPANY, No. 157037; Court of Appeals No. 339123.

PEOPLE v TREANDIS JAMISON, No. 157066; Court of Appeals No. 339223.

PEOPLE v COLEMAN, No. 157071; Court of Appeals No. 338862.

PEOPLE v VINCENT MOORE, No. 157091; Court of Appeals No. 338899.

PEOPLE v CALEB JOHNSON, No. 157123; Court of Appeals No. 340793.

PEOPLE v WILLIAM COLLINS, No. 157126; Court of Appeals No. 340363.

PEOPLE v ROBERT WALKER, No. 157131; Court of Appeals No. 339146.

PEOPLE OF THE CHARTER TOWNSHIP OF REDFORD v DEFILIPPIS, No. 157194; Court of Appeals No. 338918.

PEOPLE v SCHROEDER, No. 157226; Court of Appeals No. 339472.

VIDOLICH v SALINE NORTHVIEW CONDOMINIUM ASSOCIATION, No. 157249; Court of Appeals No. 334579.

PEOPLE v WEST, No. 157274; Court of Appeals No. 338903.

PEOPLE v LEVONNE GREER, No. 157299; Court of Appeals No. 339442.

PEOPLE v DAIQUAN TURNER, No. 157301; Court of Appeals No. 341157.

PEOPLE v CHAMBERS, No. 157303; Court of Appeals No. 341487.

PEOPLE v MAURICE LEWIS, No. 157306; Court of Appeals No. 340060.

PEOPLE v LANE, No. 157321; Court of Appeals No. 335153.

CLOVERDALE HOLDINGS, LLC v WHITLOW, No. 157332; Court of Appeals No. 335424.

PEOPLE v CHAD MOORE, No. 157356; Court of Appeals No. 339358.

PEOPLE v THOMAS HOWARD, No. 157390; Court of Appeals No. 332337.

PEOPLE v RODNEY BAKER, No. 157391; Court of Appeals No. 340908.

PEOPLE v GARRY JONES, No. 157392; Court of Appeals No. 340416.

PEOPLE v LEONARD WALKER, No. 157407; Court of Appeals No. 341240.

PEOPLE v CREWS, No. 157416; Court of Appeals No. 340463.

PEOPLE v BEAM, No. 157432; Court of Appeals No. 339818.

PEOPLE v KANARY, No. 157438; Court of Appeals No. 336174.

PEOPLE v MELL, No. 157445; Court of Appeals No. 340062.

PEOPLE v EDICK, No. 157449; Court of Appeals No. 335966.

PEOPLE v ALMERAISI, No. 157453; Court of Appeals No. 341496.

PEOPLE v MCGHEE, No. 157460; Court of Appeals No. 340080.

PEOPLE v ERIC MARTIN, No. 157470; Court of Appeals No. 335252.

SMITH v UNITED WAY OF GENESEE COUNTY, No. 157482; Court of Appeals No. 335985.

SMITH v CRIM FITNESS FOUNDATION, No. 157484; Court of Appeals No. 335988.

MACOMB COUNTY v GREINER, No. 157489; Court of Appeals No. 334264.

FOSTER v GANGES TOWNSHIP, Nos. 157504 and 157505; Court of Appeals Nos. 336937 and 337278.

HAMBLIN v AUTO-OWNERS INSURANCE COMPANY, No. 157506; Court of Appeals No. 339720.

PEOPLE v STEVEN MOSS, No. 157538; Court of Appeals No. 340609.

PEOPLE v JOHN MURPHY, No. 157542; Court of Appeals No. 341144.

PEOPLE v RAFFLER, No. 157543; Court of Appeals No. 336509.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v WALTON, No. 157547; Court of Appeals No. 341373.

PEOPLE v COURON, No. 157548; Court of Appeals No. 339700.

In re PETITION OF INGHAM COUNTY TREASURER FOR FORECLOSURE, No. 157552; Court of Appeals No. 339887.

PEOPLE v DEBERRY, No. 157558; Court of Appeals No. 339974.

PEOPLE v TERRY, No. 157568; Court of Appeals No. 334401.

PEOPLE v BANGURAH, No. 157577; Court of Appeals No. 340070.

PEOPLE v CROSKEY, No. 157584; Court of Appeals No. 342099.

PEOPLE v CLINTON, No. 157586; Court of Appeals No. 340049.

PEOPLE v NEAL, No. 157587; Court of Appeals No. 343298.

PEOPLE v STUBBS-WILLIAMS, No. 157642; Court of Appeals No. 334856.

PEOPLE v LONNIE WALKER, No. 157648; Court of Appeals No. 340574.

PEOPLE v KELLEY COLVIN, No. 157649; Court of Appeals No. 342125.

PEOPLE v GUERRA, No. 157653; Court of Appeals No. 341940.

PEOPLE v HARRISON, No. 157661; Court of Appeals No. 342859.

PEOPLE v ROBERT REED, No. 157663; Court of Appeals No. 333157.

HAWTHORNE-BURDINE v BANKS, No. 157666; Court of Appeals No. 336756.

PEOPLE v JOHN BUCHANAN, No. 157670; Court of Appeals No. 340186.

PEOPLE v COWAN, No. 157673; Court of Appeals No. 340661.

PEOPLE v CONNELL HOWARD, No. 157675; Court of Appeals No. 340571.

PEOPLE v JAVOTNE ARMSTRONG, No. 157687; Court of Appeals No. 342338.

PEOPLE v WODKOWSKI, Nos. 157695 and 157696; Court of Appeals Nos. 335789 and 338042.

PEOPLE v LOPEZ, No. 157698; Court of Appeals No. 336787.

PEOPLE v DEPATTY, No. 157701; Court of Appeals No. 342668.

PEOPLE v DARON EVANS, No. 157702; Court of Appeals No. 340586.

PEOPLE v JERMAINE HILL, No. 157716; Court of Appeals No. 340775.

PEOPLE v MICHAEL REYNOLDS, No. 157721; Court of Appeals No. 342644.

PEOPLE v RYAN BROWN, No. 157734; Court of Appeals No. 342512.

PEOPLE v MILLAY, No. 157747; Court of Appeals No. 341126.

PEOPLE v MERCADO, No. 157748; Court of Appeals No. 342425.

PEOPLE v CHARLES JONES, No. 157749; Court of Appeals No. 340330.

PEOPLE v SHAVKEY, No. 157750; Court of Appeals No. 339552.

ZICHICHI v MULL, No. 157780; Court of Appeals No. 337043.

PEOPLE v BLANN, No. 157782; Court of Appeals No. 342435.

PEOPLE v MCKAY, No. 157805; Court of Appeals No. 341995.

PEOPLE v TREMAINE ARMSTRONG, No. 157808; Court of Appeals No. 342366.

SAIYED v NAIR, No. 157809; Court of Appeals No. 335917.

PEOPLE v KHAN, No. 157810; Court of Appeals No. 334945.

FAUPEL v GIFFIN FINANCIAL PLANNING SERVICES, INC, No. 157817; Court of Appeals No. 341068.

PEOPLE v MARSHALL, No. 157831; Court of Appeals No. 341647.

PEOPLE v MARSHALL, No. 157833; Court of Appeals No. 341783.

PEOPLE v PARMENTER, No. 157837; Court of Appeals No. 342428.

PEOPLE v BARBER, No. 157840; Court of Appeals No. 337287.

PEOPLE v BERKLEY, No. 157841; Court of Appeals No. 342806.

HAWTHORNE-BURDINE v OAKLAND UNIVERSITY, Nos. 157848 and 157849; Court of Appeals Nos. 338605 and 339188.

PEOPLE v PETER KING, No. 157853; Court of Appeals No. 342362.

PEOPLE v KIRBY, No. 157854; Court of Appeals No. 336840.

PEOPLE v STACY BROWN, No. 157856; Court of Appeals No. 342457.

PEOPLE v KELEL, No. 157866; Court of Appeals No. 336268.

PEOPLE v CURTIS HARRIS, No. 157868; Court of Appeals No. 342301.

HAWTHORNE-BURDINE v FREEDMAN, No. 157869; Court of Appeals No. 338285.

PEOPLE v CURTIS HARRIS, No. 157870; Court of Appeals No. 342302.

PEOPLE v ANTHONY WILLIAMS, No. 157874; Court of Appeals No. 342762.

PEOPLE v HAWKINS, No. 157875; Court of Appeals No. 341088.

PEOPLE v DEEM, No. 157882; Court of Appeals No. 341900.

PEOPLE v CHARLES CLAY, Nos. 157884, 157885, and 157886; Court of Appeals Nos. 335179, 335395, and 336828.

PEOPLE v MURDOCK, No. 157887; Court of Appeals No. 337430.

PEOPLE v PHILLIPS, No. 157892; Court of Appeals No. 336281.

PEOPLE v SLEEPER, No. 157896; Court of Appeals No. 337069.

PEOPLE v SCHWARTZ, No. 157898; Court of Appeals No. 341829.

PEOPLE v DECARLOS MITCHELL, No. 157909; Court of Appeals No. 342690.

BREIDENBACH v DEPARTMENT OF CORRECTIONS, No. 157911; Court of Appeals No. 342233.

PEOPLE v BERNARD PETERSON, No. 157914; Court of Appeals No. 335251.

PEOPLE v SHERROD JOHNSON, No. 157919; Court of Appeals No. 342809.

PEOPLE v GREGORY ROBINSON, No. 157920; Court of Appeals No. 342421.

PEOPLE v JESSIE, No. 157942; Court of Appeals No. 335736.

PEOPLE v STEWART, No. 157945; Court of Appeals No. 338726.

PEOPLE v CLARENCE ROSS, No. 157950; Court of Appeals No. 321353.

PEOPLE v BOWLING, No. 157959; Court of Appeals No. 336769.

PEOPLE v DERRICK MASON, No. 157960; Court of Appeals No. 342948.

WILLIAMS v ST LOUIS CORRECTIONAL FACILITY WARDEN, No. 157965; Court of Appeals No. 342856.

BARTLETT v DEPARTMENT OF REGULATORY AFFAIRS, No. 157973; Court of Appeals No. 342752.

PEOPLE v LAWHEAD, No. 157976; Court of Appeals No. 338063.

WRIGHT v CITY OF SAGINAW, No. 157977; Court of Appeals No. 339402.

PEOPLE v DRECO MCKINNEY, No. 157978; Court of Appeals No. 342876.

GASKIN v RIDER, No. 157980; Court of Appeals No. 337710.

PEOPLE v DAVON MILLER, No. 157984; Court of Appeals No. 335738.

PEOPLE v WILLIAM KING, No. 158000; Court of Appeals No. 335606.

PEOPLE v CARLOUS LEAK, No. 158001; Court of Appeals No. 341687.

YOB v SMITH, No. 158002; Court of Appeals No. 339607.

WHITE v HAQUE, No. 158009; Court of Appeals No. 334084.

PEOPLE v HANSON, No. 158011; Court of Appeals No. 342700.

PEOPLE v CROFT, No. 158018; Court of Appeals No. 343157.

SAIYED v NAIR, No. 158026; Court of Appeals No. 338549.

SAIYED v NAIR, No. 158028; Court of Appeals No. 338549.

PEOPLE v MAY-SHAW, No. 158032; Court of Appeals No. 342527.

PEOPLE v TUESDAY ROSE, No. 158034; Court of Appeals No. 343284.

PEOPLE v HOLLOWAY, No. 158039; Court of Appeals No. 342720.

PEOPLE v HEMPHILL, No. 158044; Court of Appeals No. 341406.

PEOPLE v COTTLE, No. 158064; Court of Appeals No. 343141.

LEROY TOWNSHIP v MITCHELL, No. 158081; Court of Appeals No. 341668.

ABDI v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 158094; Court of Appeals No. 341608.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v HOATH, No. 158143; Court of Appeals No. 343918.

Superintending Control Denied October 30, 2018:

FROLING v ATTORNEY GRIEVANCE COMMISSION, No. 157665.

Reconsideration Denied October 30, 2018:

HEMPHILL v SULEIMAN, No. 155464; Court of Appeals No. 335351. Leave to appeal denied at 502 Mich 910.

SMITH v HENRY FORD HEALTH SYSTEM, No. 155679; Court of Appeals No. 335910. Leave to appeal denied at 502 Mich 911.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v WILKINS, No. 156628; Court of Appeals No. 332430. Leave to appeal denied at 502 Mich 936.

PEOPLE v GOMEZ, No. 156633; Court of Appeals No. 339375. Leave to appeal denied at 502 Mich 936.

PEOPLE v DAWSON, No. 156663; Court of Appeals No. 339748. Leave to appeal denied at 502 Mich 901.

PEOPLE v GRABINSKI, No. 156692; Court of Appeals No. 339226. Leave to appeal denied at 502 Mich 936.

PEOPLE v JAQUAN WILSON, No. 156693; Court of Appeals No. 337551. Leave to appeal denied at 502 Mich 936.

PEOPLE v ROSCOE MARTIN, No. 156783; Court of Appeals No. 338830. Leave to appeal denied at 502 Mich 937.

PEOPLE v SHEPARD, No. 156866; Court of Appeals No. 338179. Leave to appeal denied at 502 Mich 937.

PEOPLE v PLATTE, No. 156872; Court of Appeals No. 337739. Leave to appeal denied at 502 Mich 937.

PEOPLE v WATERS, No. 156914; Court of Appeals No. 338459. Leave to appeal denied at 502 Mich 937.

PEOPLE v MCQUIRTER, No. 156995; Court of Appeals No. 340822. Leave to appeal denied at 502 Mich 937.

PEOPLE v DENNIS ANDERSON, No. 157039; Court of Appeals No. 334257. Leave to appeal denied at 502 Mich 902.

PEOPLE v MICHAEL SYKES, No. 157125; Court of Appeals No. 335384. Leave to appeal denied at 502 Mich 903.

Application for Leave to Appeal Dismissed October 31, 2018:

WHITE v DETROIT EAST COMMUNITY MENTAL HEALTH, No. 158532; Court of Appeals No. 342858. On order of the Court, the motion to waive fees is considered, and it is denied. We direct the Clerk of this Court to dismiss the plaintiff's application for leave to appeal unless the filing fee in this matter is paid in full within 28 days after the date of this order.

We find that plaintiff is a vexatious litigator under MCR 7.316(C)(3). We therefore direct the Clerk of this Court not to accept any further filings from the plaintiff in this matter unless the plaintiff has obtained leave and has submitted the filing fee required by MCR 7.319.

Leave to Appeal Denied November 2, 2018:

In re UNDERWOOD/STRANGE, MINORS, No. 158395; Court of Appeals No. 342085.

In re LARKINS/LEE/PHILLIPS, MINORS, No. 158498; Court of Appeals No. 341382.

Summary Disposition November 7, 2018:

LAMKIN V HARTMEIER, No. 154563; Court of Appeals No. 326986. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals. We do not disturb the remand to Livingston Circuit Court on the issue of nuisance. We remand this case to the Court of Appeals for reconsideration as to whether each defendant established a prescriptive easement in light of *Marlette Auto Wash, LLC v Van Dyke SC Properties, LLC*, 501 Mich 192 (2018), and for reconsideration of the scope of each easement based on the manner of use by which the easement was acquired and the manner of the previous enjoyment, see *Heydon v MediaOne*, 275 Mich App 267, 271 (2007). In all other respects, the applications are denied. We do not retain jurisdiction.

PEOPLE V OLAJUWON CARTER, No. 155451; Court of Appeals No. 326442. By order of September 12, 2017, the application for leave to appeal the January 19, 2017 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Randolph* (Docket No. 153309). On order of the Court, the case having been decided on June 15, 2018, 502 Mich 1 (2018), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II.C of the judgment of the Court of Appeals, and we remand this case to that court for reconsideration in light of *Randolph*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V BIERI, No. 156532; Court of Appeals No. 332376. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing the denial of the defendant's pretrial request for funds to pay for an independent DNA expert, and we remand this case to that court for reconsideration in light of *People v Kennedy* (Docket No. 154445). In all other respects, leave to

appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Granted November 7, 2018:

FOSTER v FOSTER, No. 157705; Court of Appeals No. 324853. The parties shall include among the issues to be briefed: (1) whether the principles set forth in *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017), apply to combat-related special compensation (CRSC), 10 USC 1413a; (2) if so, whether *Megee v Carmine*, 290 Mich App 551 (2010), remains good law in light of *Howell*; and (3) whether the Court of Appeals was correct in upholding the Dickinson Circuit Court's November 6, 2014 contempt order against the defendant. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Operation Firing for Effect, Forgotten Warriors Project, Inc., and Veterans of Foreign Wars Insurance Institute of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered November 7, 2018:

PEOPLE v ANTJUAN JACKSON, No. 156502; reported below: 320 Mich App 514. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the provision in MCL 777.19(1) that the sentencing guidelines only apply to an attempt to commit an enumerated offense "if the attempted violation is a felony" requires that the offense the defendant attempted to commit be a felony, or the attempt conviction itself be a felony, for purposes of scoring Offense Variable (OV) 13, MCL 777.43(1)(c). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

In re PILAND, MINORS, No. 157918; reported below: 324 Mich App 337. The petitioner shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the respondents are entitled to a jury instruction based on MCL 722.634, which states: "A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian;" and (2) for purposes of this determination, the distinction, if any, between the terms "neglects" and "refuses" in MCL 712A.2(b)(1), where the family court's jurisdiction is sought on the basis of the parent's failure to obtain medical care for a child. In addition to the brief, the petitioner shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). Respondents and the lawyer-guardian ad litem shall file supplemental briefs within 21 days of being served with the petitioner's brief. The respondents shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the petitioner. A reply, if any, must be filed by the petitioner within 14 days of being served with the briefs of the respondents and the lawyer-guardian ad litem. The parties should not submit mere restatements of their application papers.

The Children's Law and Family Law Sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 7, 2018:

PEOPLE V KUZMA, No. 156587; Court of Appeals No. 337913.

PEOPLE V MONTALDI, No. 157175; Court of Appeals No. 339384.

PEOPLE V KRAGOR, No. 157190; Court of Appeals No. 340462.

PEOPLE V JEFFERY WATKINS, No. 157218; Court of Appeals No. 340825.

PEOPLE V MCKINLEY, No. 157350; Court of Appeals No. 332519.

PEOPLE V LAWANDA JENKINS, No. 157753; Court of Appeals No. 329846.

PEOPLE V KUHNS, No. 158056; Court of Appeals No. 340828.

Summary Disposition November 16, 2018:

PEOPLE V EUBANKS, Nos. 158353 and 158355; Court of Appeals Nos. 343714 and 344193. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the June 8, 2018 order of the Court of Appeals that reversed the April 18, 2018 order of the Wayne Circuit Court, and we remand this case, as it pertains to Court of Appeals Docket No. 343714, to that court, for reconsideration in light of *People v Anderson*, 501 Mich 175 (2018).

We further order that the stay entered by this Court on September 7, 2018 remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

The application for leave to appeal as it pertains to the July 16, 2018 order in Court of Appeals Docket No. 344193 is denied. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered November 16, 2018:

PEOPLE v MULLINS, No. 157116; reported below: 322 Mich App 151. The appellant shall file a supplemental brief within 42 days of the date of this order, addressing: (1) whether MCL 722.633(5), which criminalizes making a false report of felony child abuse, applies to non-mandatory reporters; (2) whether the phrase "intentionally *makes* a false report of child abuse or neglect" (emphasis added) is broad enough to encompass a circumstance in which a child is intentionally enlisted for the purpose of falsely accusing another of abuse or neglect, see MCL 750.411a; *United States v Giles*, 300 US 41, 48-49; 57 S Ct 340; 81 L Ed 493 (1937); and (3) whether MCL 722.633(5) must be read in light of the common-law doctrine of the innocent agent. See Const 1963, art 3, § 7. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

DROUILLARD v AMERICAN ALTERNATIVE INSURANCE CORPORATION, No. 157518; reported below: 323 Mich App 212. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the appellee was entitled to summary disposition on the ground that there was no "uninsured motor vehicle" as defined in the insurance policy. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use

of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Insurance Alliance of Michigan, the Michigan Association for Justice, and the Auto Club Insurance Association are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

In re CHURCHILL/BELINSKI, MINORS, No. 157991; Court of Appeals No. 337790. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment affirming the Clare Circuit Court's exercise of jurisdiction over the respondent-mother's minor children, SLB and JWC, and we vacate the Clare Circuit Court's February 17, 2017 order of adjudication and March 15, 2017 order of disposition as they pertain to SLB and JWC. There is no independent basis to conclude that SLB or JWC come within the statutory requirements of MCL 712A.2(b). See *In re Brock*, 442 Mich 101, 108-109 (1993). And the petitioner did not present a theory of anticipatory neglect to the jury or to the Court of Appeals. See *In re LaFlure*, 48 Mich App 377, 392 (1973). In all other respects, leave to appeal is denied as to respondent's minor children SLB and JWC, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We direct the Clerk to schedule oral argument on the application as it relates to the respondent's minor child, OTC. MCR 7.305(H)(1).

The respondent shall file a supplemental brief within 42 days of the date of this order addressing whether the Clare Circuit Court properly exercised jurisdiction over OTC. In addition to the brief, the respondent shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The petitioner shall file a supplemental brief within 21 days of being served with the respondent's brief. The petitioner shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the respondent. A reply, if any, must be filed by the respondent within 14 days of being served with the petitioner's brief. The parties should not submit mere restatements of their application papers.

The Youth Law Center and the Children's Law and Family Law Sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 16, 2018:

PEOPLE V BRIAN ROBERTS, No. 156223; Court of Appeals No. 327296. On October 9, 2018, the Court heard oral argument on the application for

leave to appeal the June 6, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. Defendant argues that defense counsel performed deficiently because he did not present expert testimony to counter that presented by the prosecutor concerning the two-year-old victim's abusive head trauma (AHT) and that this deficiency was prejudicial to his defense, resulting in the ineffective assistance of counsel. For the reasons set forth in Justice ZAHRA's dissent, I disagree that defense counsel performed deficiently and write separately to assert that defendant is not entitled to a new trial for the additional reason that he has failed to show prejudice.[1]

" 'To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.' " *People v Dendel*, 481 Mich 114, 125 (2008), amended 481 Mich 1201 (2008), quoting *People v Carbin*, 463 Mich 590, 600 (2001). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Dendel*, 481 Mich at 125, quoting *Strickland v Washington*, 466 US 668, 694 (1984). "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington v Richter*, 562 US 86, 111 (2011), quoting *Strickland*, 466 US at 696. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' " *Id*. at 111-112, quoting *Strickland*, 466 US at 693, 697.

At trial, defense counsel asserted that defendant accidentally caused the fatal injuries by pulling the child's ankles when the child was standing, which resulted in the child losing his balance and striking his head on the floor. In contrast, the prosecutor asserted that defendant intentionally caused the injuries by handling the child violently—either by shaking the child or causing his head to forcefully strike the floor, or both. Thus, because the parties did not dispute that defendant caused the injuries, the critical factual dispute at trial concerned whether he possessed the requisite intent for the charges of second-degree murder and felony murder with the predicate felony of first-degree child abuse. "The intent necessary for second-degree murder is the intent to kill, the *intent to inflict great bodily harm*, or the willful and wanton disregard for whether death will result." *People v Robinson*, 475 Mich 1, 14 (2006).

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[1] " 'To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in [*Strickland v Washington*, 466 US 668 (1984)].' " *People v Dendel*, 481 Mich 114, 124-125 (2008), amended 481 Mich 1201 (2008), quoting *People v Carbin*, 463 Mich 590, 600 (2001). "First, the defendant must show that counsel's performance was deficient." *Dendel*, 481 Mich at 125 (quotation marks and citations omitted). "Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. (quotation marks and citations omitted).

"[T]o be convicted of first-degree child abuse, a person [must have] 'knowingly or intentionally cause[d] serious physical harm or serious mental harm to a child.' " *People v Maynor*, 470 Mich 289, 295 (2004). First-degree child abuse may be the predicate felony for felony murder. See *id*. at 293.

Defendant cannot show prejudice because there existed strong evidence that he possessed the requisite intent for second-degree murder and felony murder with the predicate felony of first-degree child abuse, thus sustaining the jury's verdicts for those offenses.[2]

First, defendant altered his story about the fatal injuries multiple times. He initially told the detective that he had witnessed the child falling down the stairs, and then he told the detective that he had not witnessed the child falling down the stairs and only assumed that such a fall had occurred because he heard a thumping sound. Thereafter, following his arrest a few months after the fatal incident, he told the detective that he had caused the fatal injuries by pulling the child's ankles, intending that the child land on his butt but instead causing the child to lose his balance and strike his head on the floor. In my judgment, these conflicting statements go beyond innocent lapses of memory and reflect a desire to conceal incriminating facts from law enforcement. That is, defendant's inability consistently to reiterate two critical facts surrounding the fatal incident—whether he saw them occur or caused them to occur, or both—is affirmatively indicative of guilt. See *People v Unger*, 278 Mich App 210, 225-226 (2008), quoting *People v Cowell*, 44 Mich App 623, 625 (1973) (" '[C]onflicting statements tend to show a consciousness of guilt . . . .' ").

Second, a witness testified that in November 2013, about one month before the fatal incident, she heard defendant tell the child, "[S]it your bitch ass down for [sic] you get fucked up. I'm about to beat your ass if you don't sit down." Defendant's conduct was so shocking to her that when she learned about the child's death, she went "downtown" to share her information with the police because she believed that she "coulda prevent[ed] this from happening if [she] woulda just said something then . . . ." Such threatening statements to the child tend to show guilt in this child-abuse case. See *People v VanderVliet*, 444 Mich 52, 81 n 37 (1993), quoting Imwinkelried, Uncharged Misconduct Evidence, § 5:10, p 26 ("The courts often admit uncharged misconduct in child abuse cases when the defendant claims that he or she accidentally injured the child. . . . If the defendant claims that she intended to merely discipline her child, evidence of uncharged misconduct may be admissible to establish the defendant's intent to injure the child.").

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[2] The Court of Appeals correctly noted that "[i]t is a violation of double jeopardy to convict someone of multiple murder counts arising from the death of a single murder victim," *People v Roberts*, unpublished opinion per curiam of the Court of Appeals, issued June 6, 2017 (Docket No. 327296), p 1 n 1, so the second-degree murder conviction should be vacated here.

Third, there was general agreement among the doctors who testified at trial—and at the *Ginther*[3] hearing as well—that the child had suffered two "subdural hemorrhages," which are essentially internal injuries adjacent to the brain.[4] One subdural hemorrhage was apparently suffered weeks before the fatal incident, and the second subdural hemorrhage was suffered as part of the fatal incident. There was also general agreement that subdural hemorrhages are caused by the application of force to the head. Importantly, the child was in defendant's custody for most of time during which the weeks-old subdural hemorrhage could have occurred. Perhaps one subdural hemorrhage, by itself, could have been caused by an accidental fall, as defendant's experts at the *Ginther* hearing testified. However, logic would suggest that *two* subdural hemorrhages indicated either a notable coincidence or, more likely given the other evidence, a pattern of abuse by defendant.

The incriminating evidence cited above was in addition to the opinion testimony from prosecutor's experts that the fatal injuries suffered by the child were indicative of intentionally inflicted abuse. And as the trial court stated in its opinion and order denying the motion for a new trial, defendant's experts only testified at the *Ginther* hearing that defendant's innocent explanation for the fatal injuries was "a possibility." It strikes me as unwarranted to grant defendant a new trial on the basis of such vague and tentative assertions.[5] Anything is "possible"; it is only by engaging in a reasoned process of elimination of one or more alternative possibilities that a jury is able to find guilt beyond a reasonable doubt when a defendant offers an innocent explanation for allegedly criminal conduct. Here, even if the experts offered by defendant at the *Ginther* hearing had testified at trial and the jury had found them credible, the jury would have been left with weighing

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[3] *People v Ginther*, 390 Mich 436 (1973).

[4] As a neuropathologist explained at trial:

> [T]here are actually veins that cover the surface of the brain. . . . And so you have these veins that basically sit out here between the dura on the top and the brain underneath . . . . And often with impact, literature says it doesn't have to be impact, but often with impact, you'll have rupture of these veins that sit on the surface of the brain. And the rupture of those veins are what results in this hemorrhage over the surface of the brain that we call subdural. And that's basically the accepted mechanism for subdural hemorrhage.

[5] Indeed, this testimony was not as helpful as the testimony offered at the *Ginther* hearing recently assessed in *People v Ackley*, 497 Mich 381 (2015), in which we concluded that the defendant was entitled to a new trial because he was denied the effective assistance of counsel by counsel's failure altogether to secure expert testimony concerning AHT. In *Ackley*, the favorable assertion offered by the defendant's expert after trial was that the head injuries "were caused by a *likely* accidental 'mild impact.' " *Id.* at 387 (emphasis added).

the "possibility" that there was an innocent explanation for the fatal injuries against the prosecutor's substantial evidence that those injuries had been intentionally inflicted, in addition to the contrary nonexpert testimony. On this record, I discern no basis for concluding that it is "reasonably likely" that the allegedly deficient performance by defense counsel, i.e., the failure to present such testimony from the two *Ginther* hearing experts at trial, was prejudicial to defendant.

Accordingly, I conclude that defendant failed to show prejudice because the circumstantial evidence that he possessed the requisite criminal intent for the charges of which he was convicted was substantial. Thus, for the reasons both set forth above and in Justice ZAHRA's dissent, I believe that the trial court did not err by denying defendant's motion for a new trial and that the Court of Appeals erred by ruling to the contrary. Consequently, I would reverse the judgment of the Court of Appeals and reinstate the trial court's order denying defendant's motion for a new trial.

WILDER, J., joins the statement of MARKMAN, C.J.

ZAHRA, J. (*dissenting*). I respectfully dissent from the Court's decision to deny the prosecution's application. In my view the Court of Appeals failed to provide the trial court's findings any measure of deference and improperly relied on this Court's decision in *People v Ackley*.[1] Unlike this Court's decision in *Ackley*, where the expert himself expressly informed defense counsel that " 'you don't want me as your defense expert,' "[2] or *Hinton v Alabama*, where defense counsel himself deemed an expert inadequate,[3] or *Ceasor v Ocwieja*, where defense counsel wanted to call an expert at trial but failed to petition the court for fees,[4] there is no indication that defense counsel believed Dr. Stephen Guertin to be unduly biased, inadequate, or unavailable. In fact, all indications suggest the opposite.[5] The United States Supreme Court has made clear that

> the inadequate assistance of counsel . . . does not consist of the hiring of an expert who, though qualified, was not qualified

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[1] *People v Ackley*, 497 Mich 381 (2015).

[2] *Id*. at 386.

[3] *Hinton v Alabama*, 571 US 263, 275 (2014) (holding that "the unreasonable failure to understand the resources that state law made available to [defense counsel]—that caused counsel to employ an expert that *he himself* deemed inadequate"—was an "inexcusable mistake of law").

[4] *Ceasor v Ocwieja*, 655 Fed Appx 263, 273, 285 (2018).

[5] Defendant's new assertion that Dr. Guertin was "unqualified" to render an opinion on child abuse strains common sense. Indeed, the Court of Appeals properly rejected this very claim in *People v Ackley*, unpublished per curiam opinion of the Court of Appeals, issued August 2, 2018 (Docket No. 336063), p 4, lv pending (Docket No. 158455):

> As an initial matter, while Dr. Guertin was not a forensic pathologist, it defies sense to conclude that a doctor with exten-

> enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that *might* have been hired.[6]

Here, the trial court found that during

> discussions with Dr. Guertin, [defense counsel] weighed the advantage of presenting the expert pediatrician, who apparently would have given testimony that the fatal injuries Nehemiah suffered could have been accidental, against further testimony that may have revealed that Nehemiah had otherwise suffered physical abuse in other areas of his body. In balancing the impact of each, trial counsel concluded that it would be sagacious to avoid the topic of possible other physical abuse altogether in favor of obtaining at least the minimal concession from one or more of the government's witnesses that an accident might have caused the injuries.

The Court of Appeals' opinion does not mention any of the above facts the trial court relied upon to evaluate defense counsel's performance. Rather, the panel substituted its own judgment and found that "[defense counsel] did not demonstrate sufficient understanding of the pertinent medical controversy concerning the amount of force required

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> sive experience treating trauma victims would lack insight into what kinds of traumas tend to lead to what kinds of injuries. Expertise in pediatric intensive care inescapably has considerable crossover into the medical treatment portion of expertise in child abuse. Dr. Guertin was the Director of the Children's Center at Sparrow Hospital, Director of the Pediatric Intensive Care Unit, and a physician member of [the] Child Safety Program. He is also a member of two Child Death Review teams from both Eaton and Ingham County for almost twenty years. He sees about two hundred to two hundred fifty children a year who are referred because of the possibility of abuse or neglect, and he is a practicing physician who sees actual patients. He testified that he attended autopsies and performed death reviews. Clearly, Dr. Guertin did not need to be qualified as an expert in child abuse to be able to render expert testimony concerning the genesis of certain injuries.

While I normally would not cite a case currently pending review from this Court, defendant Ackley does not challenge Dr. Guertin's qualifications in his application to this Court.

[6] *Hinton*, 571 US at 274-275 (citation omitted; emphasis added).

to inflict the type of injuries involved to legitimize his decision not to attempt to secure expert testimony in support of the defense theory."[7] Thus, the panel not only failed to review for clear error the trial court's findings of fact, but also failed to appreciate that "[j]udicial scrutiny of counsel's performance must be highly deferential" and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ."[8] Indeed, as explained in *Strickland v Washington*, "[t]hese standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case."[9]

MARKMAN, C.J., and WILDER, J., join the statement of ZAHRA, J.

PATRICK V TURKELSON, No. 157265; reported below: 322 Mich App 595.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. Rather, I would grant leave to appeal to hear defendant's argument that this Court should reconsider both *McCormick v Carrier*, 487 Mich 180 (2010), and *Kreiner v Fischer*, 471 Mich 109 (2004), the latter of which was overruled by the former.

Plaintiff seeks to recover noneconomic damages arising from injuries sustained when her automobile was struck by an automobile operated by defendant. The trial court granted defendant's motion for summary disposition on the basis that plaintiff did not suffer a "serious impairment of body function." But the Court of Appeals reversed and held that questions of fact existed regarding whether plaintiff had suffered a serious impairment of body function. *Patrick v Turkelson*, 322 Mich App 595 (2018).

MCL 500.3135(1) provides:

> A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

MCL 500.3135(5) defines "serious impairment of body function" as an "objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." *Kreiner*, 471 Mich at 131, held that "[a]lthough some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected and he does not meet the

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[7] *People v Roberts*, unpublished per curiam opinion of the Court of Appeals, issued June 6, 2017 (Docket No. 327296), p 9.

[8] *Strickland v Washington*, 466 US 668, 689 (1984).

[9] *Id*. at 690.

'serious impairment of body function' threshold." It also held that the impairment must be "objectively manifested"; "[s]ubjective complaints that are not medically documented are insufficient." *Id*. at 132. *McCormick*, 487 Mich at 201, however, overruled *Kreiner* and held that an impairment affects a person's general ability to lead his or her normal life where the impairment "influence[s] some of the person's power or skill, i.e., the person's capacity, to lead a normal life." In addition, a plaintiff need only show that "some of the person's *ability* to live in his or her normal manner of living has been affected, not that some of the person's normal manner of living has itself been affected." *Id*. at 202. Finally, *McCormick* held that "the common meaning of 'objectively manifested' in MCL 500.3135(7) is an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function." *Id*. at 196.

Plaintiff claims that the side airbag, which deployed and hit her left ear, has caused her to suffer hearing loss and tinnitus. Testing showed that her hearing was mostly within normal limits, but with a mild loss at high frequencies. Her doctor testified that this could be corrected with a hearing aid, but that the loss is so minor that most people in plaintiff's position would not find a hearing aid worth the expense. Her doctor also testified that there are no objective findings to verify the existence of tinnitus because it is a "phantom" sound, but that it could conceivably have been caused by airbags. Plaintiff testified that the tinnitus has had a negative impact on her ability to work because her job requires her to spend a significant amount of time driving and the road noise makes the ringing in her ears worse. Before the accident, she worked about 30 hours a week, but now she works only about 8 hours a week. Plaintiff admitted, however, that this is partially attributable to the fact that she had a second child after the accident. She also testified that before the accident she enjoyed kayaking, hiking, and attending concerts, but she does not enjoy these activities anymore because of the tinnitus. She further testified that her ear problems have affected her ability to care for her children because she is less patient, more irritable, and more anxious. Her husband testified that they have experienced difficulties communicating since the accident and that she sometimes tells him that she cannot hear him.

At least arguably, plaintiff has not suffered a "serious impairment of body function" under *Kreiner*. There is no objective evidence that she suffers from tinnitus or indeed that she has suffered any significant hearing loss. Furthermore, even assuming that there is objective evidence of these conditions, they do not appear to affect plaintiff's "general ability to lead her normal life" under *Kreiner*. Her doctor testified that the hearing loss is "minor" and could be corrected by a hearing aid. The tinnitus, while understandably highly irritating, has, again at least arguably, not prevented plaintiff from generally leading her normal life. She takes care of her two children and although she does not work very much anymore, this appears to be mostly a function of the fact that she has chosen to stay home more to care for her children. The fact that she

does not kayak, hike, or attend concerts as much may or may not affect her "general ability to lead her normal life," for she has never testified that any of these things constituted a major part of her preaccident life. Under *Kreiner*, therefore, plaintiff arguably has not suffered a "serious impairment of body function." Under *McCormick*, however, plaintiff has, perhaps more certainly, suffered a "serious impairment of body function." Plaintiff's husband testified that she sometimes cannot hear him, which would arguably satisfy *McCormick*'s "objective" requirement, i.e., a third person observing her impairment. In addition, again perhaps more certainly, some of plaintiff's ability to live her normal life has been affected because she no longer kayaks, hikes, or attends concerts.

Plaintiff thus more certainly satisfies the no-fault act's "serious impairment" threshold for tort liability as construed by *McCormick* than she satisfies the same threshold as construed by *Kreiner*. Therefore, this would seem to be an appropriate case in which to assess both *McCormick* and *Kreiner*, which set very different standards for tort liability, and to determine which of these standards is most compatible with MCL 500.3135. Accordingly, I would grant leave to appeal.

ZAHRA, J., would grant leave to appeal.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

Reconsideration Denied November 16, 2018:

PEOPLE v CARL WATTS, No. 157044; Court of Appeals No. 339174. Leave to appeal denied at 502 Mich 938.

Summary Disposition November 21, 2018:

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v ACE AMERICAN INSURANCE COMPANY and ACE AMERICAN INSURANCE COMPANY v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, Nos. 155395 and 155396; Court of Appeals Nos. 329585 and 329614. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals opinion only to the extent it held that Farm Bureau was automatically entitled to rescission as a matter of law, and we remand this case to the Kent Circuit Court to determine whether rescission is available as an equitable remedy as between Farm Bureau and Robynn Rueckert. In all other respects, leave to appeal is denied. The motion to hear cross-appeal is denied. We do not retain jurisdiction.

MARKMAN, C.J. (*concurring*). In *Bazzi v Sentinel Ins Co*, 502 Mich 390 (2018), this Court explained that "[w]hen a plaintiff is seeking rescission, 'the trial court must balance the equities to determine whether the plaintiff is entitled to the relief he or she seeks.' " *Id*. at 410, quoting *Johnson v QFD, Inc*, 292 Mich App 359, 370 n 3 (2011). Furthermore, this Court explained, "[j]ust as the intervening interest of an innocent third party does not altogether bar rescission as an equitable remedy, neither does fraud in the application for insurance imbue an insurer with an absolute right to rescission of the policy with respect to third

parties." *Id*. at 411. Accordingly, consistent with *Bazzi*, I concur with the instant order remanding this case to the trial court "to determine whether rescission is available as an equitable remedy as between Farm Bureau and Robynn Rueckert" while denying leave to appeal in all other respects.[1] I write separately only to discuss what I view as the need to establish a coherent and workable *standard* by which the trial court is to exercise its equitable discretion in "innocent-third-party cases." What follows represents the perspective of one Justice in this regard.

In the absence of such a standard—not only, I would emphasize, in innocent-third-party cases but in every other type of civil and criminal case as well—outcomes may be based solely upon the subjective determinations and the unconstrained exercises of discretion of the trial judge, and that is not the rule of law but the rule of judges. There must always be some clear standard, some ultimate inquiry by which the court must assess the evidence and determine whether it does or does not satisfy the standard. There must, in other words, be an applicable legal rule, and that is no less true in matters of equity than in any other realm in which the "judicial power" of our Michigan Constitution is exercised. Such rules, such standards, not only guide the trial court, but they also guide the parties in comprehending their rights and responsibilities and in marshaling their arguments, and the appellate court in meaningfully reviewing the trial court's judgments. See *Warda v City Council of City of Flushing*, 472 Mich 326, 339-340 (2005) ("Absent a comprehensible standard, judicial review cannot be undertaken in pursuit of the rule of law, but only in pursuit of the personal preferences of individual judges. The latter pursuit falls outside the 'judicial power' in Michigan."); *Harmelin v Michigan*, 501 US 957, 1007 (1991) (Kennedy, J., concurring) ("[B]road and unreviewed discretion exercised by

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[1] I acknowledge that this case may concern an alleged *innocent* misrepresentation, not necessarily a *fraudulent* misrepresentation. And *Bazzi* concerned an insurance policy that was procured in a "fraudulent manner." *Bazzi*, 502 Mich at 412. *Bazzi*, however, should not be understood as limited to cases concerning a fraudulent misrepresentation. As the Court of Appeals observed here, " 'actionable fraud' is not the only kind of 'fraud or misrepresentation' " that may warrant rescission "if the contract had been procured thereby." *Farm Bureau Gen Ins Co of Mich v ACE American Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2017 (Docket No. 329585), p 4. "Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of 'fraud'—that may entitle a party to a legal or *equitable remedy* if a contract is obtained as a result of fraud or misrepresentation." *Titan Ins Co v Hyten*, 491 Mich 547, 555 (2012) (emphasis added). "These doctrines include actionable fraud, also known as fraudulent misrepresentation; innocent misrepresentation; and silent fraud, also known as fraudulent concealment." *Id*. Accordingly, even if this case concerns an innocent misrepresentation, *Bazzi* would still be applicable.

sentencing judges leads to the perception that no clear standards are being applied, and that the rule of law is imperiled by sentences imposed for no discernible reason other than the subjective reactions of the sentencing judge."). Here, absent any principled standard, "it would seem that the uncertainty associated with subjecting insurers and insureds to the whims of individual judges and their various conceptions of 'equity' would *increase* overall insurance costs because insurers would no longer be able to estimate accurately actuarial risk." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589 n 62 (2005). In light of such concerns, I offer the following brief discussion grounded within our caselaw to guide the trial court's exercise of equitable discretion in cases involving innocent third parties. This discussion does not purport to establish mechanical principles for application but merely reasonably limited standards by which trial courts may assess the evidence and render their best legal determinations concerning the extent to which such standards have been satisfied.

The ultimate issue in innocent-third-party cases, in particular those that concern both an innocent third party and an innocent insurer, pertains to which of these parties should bear the ultimate burden of the insured's fraud.[2] This essentially entails a determination as to which of the two parties is truly *more* or *less* "innocent," such that its interests should, or should not, prevail on the matter of rescission. This, in short, sets forth the legal *standard*—what are the respective or comparative levels of genuine "innocence" of the two parties? This certainly will not always be an easy, or even a comfortable, determination—choosing among innocent parties—but nonetheless it is the determination necessitated by the circumstances of this class of cases and by *Bazzi*. Both parties are presumed to be fully "innocent," and this deserves to be recognized as a starting point for analysis; indeed, the array of relevant factors to be subsequently considered are largely of a character that inform to the best of the law's ability the court's exercise of judgment concerning the "equitable" relationship between the innocent parties and between the innocent parties and the responsible party. If the insurer is ultimately deemed more "innocent," the trial court should grant rescission; if the innocent third party is deemed more "innocent," then the trial court should decline to grant rescission with respect to the third party. And it is certainly possible to imagine instances in which there will be judicial determinations falling in the middle, i.e., that neither party is more or less "innocent" than the other party.

In this regard, because the burden of establishing a right to rescission lies with the party seeking rescission, *Gardner v Thomas R Sharp & Sons*, 279 Mich 467, 469 (1937), the defrauded insurer bears the burden of establishing that rescission is warranted. Thus, where neither party is more or less "innocent" than the other, it would seem to be the

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[2] For the purposes of this discussion, I use the term "fraud" to broadly refer to cases concerning fraudulent misrepresentation, innocent misrepresentation, and fraudulent concealment. See note one of this statement.

case that the insurer has failed to satisfy its burden of proof and rescission would not be warranted with respect to the third party.

In resolving the ultimate issue in innocent-third-party cases, courts should consider the following nonexclusive list of factors, as applicable to the case at hand:

> First, the extent to which the insurer, in fact, investigated or could have investigated the subject matter of the fraud before the innocent third party was injured, which may have led to a determination by the insurer that the insurance policy had been procured on a fraudulent basis. If the insurer could have with reasonable effort obtained information indicating that the insured had committed fraud in procuring the insurance policy, equity may weigh against rescission because the insurer may be deemed to have acted without adequate professional diligence in issuing and maintaining the policy.[3]
>
> Second, the specific relationship between the innocent third party and the fraudulent insured. If the innocent third party possessed some knowledge of the fraud—perhaps because of a familial or other relationship—equity may weigh in favor of rescission because that individual is seeking to recover from the insurer despite knowledge of the fraud.[4]
>
> Third, the precise nature of the innocent third party's conduct in the injury-causing event. Where the innocent third party acted recklessly or even negligently in the course of the injury-causing event, equity may weigh in favor of rescission because the innocent third party could have avoided the injury by acting more prudently.[5]
>
> Fourth, whether the innocent third party possesses an alternative avenue for recovery absent enforcement of the insurance policy. Such an avenue for recovery may include, for example, the assigned claims plan or health insurance. Where the innocent third party possesses an alternative means of recovery, equity may weigh

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[3] See, e.g., *Deitz v Deitz*, 298 Mich 253, 258 (1941) ("The law assists those who are vigilant, not those who sleep upon their rights.") (quotation marks and citation omitted).

[4] See, e.g., *Kent v Klein*, 352 Mich 652, 656 (1958) ("[C]hancery will not permit one to enrich himself at the expense of another by closing his eyes to what is clear to the rest of mankind. Equity, to paraphrase, regards that as seen which ought to be seen, and, having so seen, as done that which ought to be done.").

[5] See, e.g., *Andreae v Wolgin*, 257 Mich 572, 579 (1932) ("An estoppel resting wholly on equity cannot be used to shift a loss from one careless person to another when the loss could not have happened without the earlier negligence of plaintiff, and the later negligence of defendant at most only contributed to the result.") (quotation marks and citation omitted).

in favor of rescission because the insurer need not suffer loss because of the fraud.[6]

Fifth, whether enforcement of the insurance policy would merely relieve the fraudulent insured of what would otherwise be the insured's personal liability to the innocent third party. That is, whether enforcement of the insurance policy would subject the insurer to coverage for tort liability for an at-fault insured. In such a case, equity may weigh in favor of rescission because enforcement of the policy would transfer liability to the innocent third party from the insured who committed the fraud to the insurer that did not commit wrongdoing.[7]

In few cases will all of these factors be applicable; in some cases, none will be applicable; and in other cases, additional factors may be applicable. Furthermore, these and other factors should not be so rigidly or mechanically applied by merely "counting them" in terms of favoring one or the other side such that the ultimate decision-making standard is obscured, concerning the respective levels of "innocence" of the insurer and the innocent third party. In sum, I believe that trial courts must consider factors such as these in deciding innocent-third-party cases and that appellate courts should assess the trial court's exercise of equitable discretion against factors such as these, as well as, most importantly, against the proper legal standard. Pursuant to their constitutional exercise of the "judicial power," no court of this state properly has free rein to unchecked or standardless exercises of "discretion"; rather, courts must restrict themselves to the application of the law, and equity, and their accompanying obligations. The factors identified here, and others that are similarly relevant to the standard set forth herein, will further our state's rule of law and afford reasonable protection to both innocent third parties and defrauded insurers against entirely arbitrary legal outcomes.

YU V FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 155811; Court of Appeals No. 331570. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we reverse the April 11, 2017 judgment of the Court of Appeals. The circuit court correctly

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[6] See, e.g., *Doering v Baker*, 277 Mich 683, 688 (1936), quoting 1 Pomeroy, Equity Jurisprudence (3d ed), p 704 ("[E]quity 'will not suffer a wrong to go without a remedy.' "). See also *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 251 (1980) ("[B]efore recovery of benefits may be obtained through an assigned claims plan, it must be determined that no personal protection insurance is 'applicable to the injury'.").

[7] See, e.g., *Titan Ins Co*, 491 Mich at 568-569 ("The no-fault act seeks to protect third parties in a variety of ways, including through tort actions, but it states nothing about altering the common law that enables insurers to obtain traditional forms of relief when they have been the victims of fraud.").

concluded that equitable estoppel did not bar the defendant from denying coverage for the December 2013 water leak in the plaintiffs' Portage house. "[T]he maxim that 'one who comes into equity must come with clean hands' is 'the expression of one of the elementary and fundamental conceptions of equity jurisprudence.' " *Rose v Nat'l Auction Group*, 466 Mich 453, 462 (2002), quoting 2 Pomeroy's Equity Jurisprudence, ch I, § 397, p 90, and § 398, p 92 (1941). The plaintiffs by their own admission never told the defendant they had moved out of the Portage house when they put that house up for sale in 2013. They also told the defendant that they "were moving" in February 2013 rather than that they "had moved," and they never asked for a seasonal policy for a non-primary residence. The defendant relied on those misrepresentations and omissions to conclude the plaintiffs still resided in the Portage house when it renewed the homeowner's policy on the house in November 2013. The Court of Appeals therefore erred by holding that the defendant was equitably estopped from denying coverage under the facts of this case. We remand this case to the Court of Appeals for consideration of the remaining issue raised by the parties but not addressed by that court in its initial review of the case.

PEOPLE V JUAN WALKER, No. 156782; Court of Appeals No. 332491. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals holding that the trial court clearly erred in finding a reasonable probability that the defendant would have accepted the plea offer, and we remand this case to that court for consideration of whether *Lafler v Cooper*, 566 US 156 (2012), should be applied retroactively to this case, in which the defendant's convictions became final in 2005.

The Court of Appeals found clear error in the trial court's memorandum opinion and in its statements during oral argument at a subsequent hearing. However, in its review of the record, the Court of Appeals failed to recognize that, at the end of that hearing, the trial court quoted the applicable standard from *Lafler* and unequivocally found that there was a reasonable probability that the defendant would have accepted the plea offer. This finding—made by the trial judge who presided over the trial and the evidentiary hearing—is supported by the record, and we are not "left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289 (2011).

PEOPLE V GUNN, No. 156962; Court of Appeals No. 333317. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, we vacate the second-degree arson sentence of the Wayne Circuit Court, and we remand this case to the trial court for resentencing on that count. The trial court erred by finding that it did not have the authority to review the defendant's sentence for second-degree arson. When the defendant was originally sentenced, the probation department calculated her guidelines only for the higher crime class offense of placing explosives on or near property, MCL 750.207(2)(b), and not for second-degree arson, MCL 750.73(1). The trial court sentenced the defendant to 15 years for both crimes, which was a departure sentence for the arson offense, but it had no

practical effect in light of the sentence for placing explosives on or near property. The trial court acknowledged this by stating that the arson sentence was "really based on" the higher class sentence. After the defendant was resentenced in 2016 and her sentence for placing explosives on or near property was reduced, the departure sentence for arson was no longer inconsequential. The arson sentence, being based on a higher class crime offense sentence that had been significantly reduced, was invalid because it was based on inaccurate information, and the trial court had the authority to resentence the defendant on that count. *People v Francisco*, 474 Mich 82, 88 (2006); MCR 6.429(A).

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

PEOPLE v TUVOIL BELL, No 156964; Court of Appeals No. 338625. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the July 30, 2014 amended judgment of sentence, and we remand this case to the Oakland Circuit Court to reinstate the June 16, 2014 judgment of sentence. Because the June 16, 2014 judgment of sentence was valid under *People v Williams*, 294 Mich App 461 (2011), the Oakland Circuit Court lacked the authority to correct the sentence. MCR 6.429(A) ("[T]he court may not modify a valid sentence after it has been imposed except as provided by law.").

PEOPLE v JUSTIN BAILEY, No. 157537; Court of Appeals No. 336685. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *People v Sharpe*, 502 Mich 313 (2018). We do not retain jurisdiction.

Leave to Appeal Granted November 21, 2018:

RAFAELI, LLC v OAKLAND COUNTY, No. 156849; Court of Appeals No. 330696. The parties shall address whether the defendants violated either the Takings Clause of the United States Constitution, US Const, Am V, or the Takings Clause of the Michigan Constitution, Const 1963, art 10, § 2, or both, by retaining proceeds from the sale of tax foreclosed property that exceeded the amount of the tax delinquency in accordance with MCL 211.78m(8)(h). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

HONIGMAN MILLER SCHWARTZ AND COHN, LLP v CITY OF DETROIT, No. 157522; reported below: 322 Mich App 667. The parties shall address whether the Court of Appeals erred in its construction of the phrase "services rendered within the city" in the Uniform City Income Tax Ordinance, MCL 141.623. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The City of Grand Rapids and the Taxation Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or

groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered November 21, 2018:

PEOPLE v SAMMONS, No. 156189; Court of Appeals No. 332190. By order of April 4, 2018, the prosecuting attorney was directed to answer the application for leave to appeal the July 6, 2017 judgment of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered, and we direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

We further order the Saginaw Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint attorney Christine DuBois, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court.

The appellant shall file a supplemental brief within 42 days of the date of the order appointing counsel, addressing whether (1) the show-up identification procedure was impermissibly suggestive, see *People v Kurylczyk*, 443 Mich 289, 303-306 (1993); (2) if so, whether the identification was nonetheless sufficiently reliable so that it was properly admitted, *Perry v New Hampshire*, 565 US 228, 238-239 (2012); and (3) if improperly admitted, whether it is more probable than not that the erroneous admission of the identification through the detective's testimony affected the outcome of the trial. *People v Lukity*, 460 Mich 484, 496 (1999).

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v REICHARD, No. 157688; reported below: 323 Mich App 613. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals correctly determined that duress is not an available defense to the charge of felony murder under any circumstances. See *People v Aaron*, 409 Mich

672 (1980); *Wright v State*, 402 So 2d 493, 498 n 8 (Fla Dist Ct App, 1981). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 21, 2018:

PEOPLE v ROBAR, No. 156656; reported below: 321 Mich App 106.

PEOPLE v ROLANDO FARRIS, No. 156757; Court of Appeals No. 339609.

THE MEISNER LAW GROUP PC v WESTON DOWNS CONDOMINIUM ASSOCIATION, No. 157052; reported below: 321 Mich App 702.

ZORAN v TOWNSHIP OF COTTRELLVILLE, No. 157177; reported below: 322 Mich App 470.

NOTTINGHAM VILLAGE CONDOMINIUM ASSOCIATION v PENSOM, No. 157327; Court of Appeals No. 333311.

PEOPLE v MELVIN THOMAS, No. 157427; Court of Appeals No. 335182.

PEOPLE v DAYQUAN JACKSON, No. 157481; Court of Appeals No. 336745.

PEOPLE v SOONEJOO GRAHAM, No. 157580; Court of Appeals No. 337780.

In re LL MELENDEZ, MINOR, No. 158544; Court of Appeals No. 338076.

In re ZD BELL, MINOR, No. 158546; Court of Appeals No. 341882.

PEOPLE v GARY KELLY, No. 158667; Court of Appeals No. 346140.

DWYER v ASCENSION CRITTENTON HOSPITAL, No. 158668; Court of Appeals No. 346170.

Leave to Appeal Denied November 28, 2018:

COX v HARTMAN, Nos. 157068 and 157069; reported below: 322 Mich App 292.

BERNSTEIN, J., would grant leave to appeal.

PEOPLE v PRUESNER, No. 158524; Court of Appeals No. 337576.

Summary Disposition December 4, 2018:

PEOPLE v HICKERSON, No. 153305; Court of Appeals No. 322891. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate part II.B. of the Court of Appeals judgment and we remand this case to that court to review the defendant's sentence for first-degree murder for an abuse of discretion.

PEOPLE v MCDADE, No. 153347; Court of Appeals No. 323614. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to that court to review the defendant's sentence for first-degree murder for an abuse of discretion.

Leave to Appeal Denied December 4, 2018:

PEOPLE v LEON WATSON, No. 156637; Court of Appeals No. 333125. The denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR Subchapter 6.500 that may include his claims of ineffective assistance of appellate counsel.

SPITZER v ABRAMSON, No. 156858; Court of Appeals No. 333158.

PEOPLE v LOTT, No. 157181; Court of Appeals No. 334193.

PEOPLE v DAVID SMITH, No. 157357; Court of Appeals No. 333983.

PEOPLE v ANDREW KNIGHT, No. 157479; Court of Appeals No. 340694.

PEOPLE v BOGSETH, No. 157480; Court of Appeals No. 335864.

PEOPLE v VALENTIN, No. 157491; Court of Appeals No. 339882.

PEOPLE v LUTZ, No. 157496; Court of Appeals No. 336675.

BELLAMY v DEPARTMENT OF CORRECTIONS, No. 157500; Court of Appeals No. 336584.

PEOPLE v MALLORY, No. 157502; Court of Appeals No. 335843.

PEOPLE v TAMARA STEPHENS, No. 157512; Court of Appeals No. 340946.

PEOPLE v WATTERS, No. 157515; Court of Appeals No. 342036.

GREAT LAKES EYE INSTITUTE, PC v KREBS, No. 157526; Court of Appeals No. 335405.

PEOPLE v TRESVANT, No. 157541; Court of Appeals No. 341830.

PEOPLE v DARRYL WARREN, No. 157546; Court of Appeals No. 340092.

TRUDEL v CITY OF ALLEN PARK, No. 157551; Court of Appeals No. 332661.

PEOPLE v AARON MITCHELL, No. 157569; Court of Appeals No. 341853.

PEOPLE v SIMPSON, No. 157690; Court of Appeals No. 340952.

LAWRENCE M CLARKE, INC v DRAEGER, No. 157693; Court of Appeals No. 336481.

GREGORY REED AND ASSOCIATES, PC v STEELE, No. 157694; Court of Appeals No. 335939.

PEOPLE v ERIK THOMPSON, No. 157708; Court of Appeals No. 340638.

PEOPLE v MCCOLLUM, No. 157715; Court of Appeals No. 341181.

CITY OF HIGHLAND PARK v COUNTY OF WAYNE, No. 157736; Court of Appeals No. 334203.

PEOPLE v AKINS, No. 157756; Court of Appeals No. 339914.

PEOPLE v BIRD, No. 157758; Court of Appeals No. 342030.

PEOPLE v AMAR FOUNTAIN, No. 157766; Court of Appeals No. 335034.

PEOPLE v O'DONNELL, No. 157769; Court of Appeals No. 343259.

PEOPLE v LUIKES, No. 157774; Court of Appeals No. 342022.

PEOPLE v MONTGOMERY, No. 157779; Court of Appeals No. 341556.

PEOPLE v DANA COOK, No. 157787; reported below: 323 Mich App 435.

PEOPLE v DEJUANA SCOTT, No. 157806; Court of Appeals No. 341584.

PEOPLE v DAQUAVIS MARTIN, No. 157843; Court of Appeals No. 341357.

PEOPLE v BOGARD, No. 157844; Court of Appeals No. 338012.

PEOPLE v KERRY HAWKINS, No. 157855; Court of Appeals No. 343326.

STEELE v MCCAULEY and *In re* ESTATE OF ROSA LOUISE PARKS, Nos. 157876, 157877, and 157878; Court of Appeals Nos. 332305, 334192, and 339192.

PEOPLE v VERDUSCO, No. 157890; Court of Appeals No. 341316.

PEOPLE v ZEBADIAH HOLLAND, No. 157894; Court of Appeals No. 341130.

PEOPLE v ALEXIS MILNER, No. 157895; Court of Appeals No. 341573.

PEOPLE v ANTHONY ADAMS, No. 157901; Court of Appeals No. 335072.

PEOPLE v MCNEES, No. 157912; Court of Appeals No. 337426.

PEOPLE v BILLIE MCKINNEY, No. 157913; Court of Appeals No. 341650.

PEOPLE v DOUGLAS JAMISON, No. 157916; Court of Appeals No. 337602.

PEOPLE v ATWOOD, No. 157923; Court of Appeals No. 342314.

PEOPLE v BUGG, No. 157924; Court of Appeals No. 342832.

PEOPLE v GEBHARDT, No. 157928; Court of Appeals No. 342980.

GOHL v TURBIAK, Nos. 157946 and 157947; Court of Appeals Nos. 335389 and 335604.

PEOPLE v MCPHAIL, No. 157949; Court of Appeals No. 342728.

PEOPLE v STERHAN, No. 157954; Court of Appeals No. 341291.

WALLACE v BELLAMY CREEK CORRECTIONAL FACILITY WARDEN, No. 157955; Court of Appeals No. 341374.

PEOPLE v LARRY BAKER, No. 157956; Court of Appeals No. 341818.

PEOPLE v SHAMON SMITH, No. 157957; Court of Appeals No. 341024.

PEOPLE v ANTHONY EVANS, No. 157958; Court of Appeals No. 342619.

PEOPLE v DAVID, No. 157961; Court of Appeals No. 342682.

PEOPLE v MIKULEN, No. 157969; reported below: 324 Mich App 14.

PEOPLE v LEKELDRIC PORTER, No. 157975; Court of Appeals No. 341611.

PEOPLE v SEARS, No. 157982; Court of Appeals No. 342407.

PEOPLE v MCCOY, No. 157992; Court of Appeals No. 340731.

PEOPLE v JOSEPH GILMORE, No. 157993; Court of Appeals No. 342318.

JUNE v TUTTLE, No. 157998; Court of Appeals No. 339597.

PEOPLE v JAMES BROOKS, No. 158004; Court of Appeals No. 341118.

PEOPLE v QUINTON JONES, No. 158007; Court of Appeals No. 342938.

REED v STATE OF MICHIGAN, No. 158017; reported below: 324 Mich App 449.

PEOPLE v CHAPPEL, No. 158021; Court of Appeals No. 336794.

PEOPLE v DENNIS, No. 158024; Court of Appeals No. 343697.

PEOPLE v CLOWER, No. 158031; Court of Appeals No. 334943.

PEOPLE v DOUGHERTY, No. 158033; Court of Appeals No. 339352.

PEOPLE v JOHN SMITH, No. 158049; Court of Appeals No. 343486.

PEOPLE v HAMMA, No. 158051; Court of Appeals No. 343368.

PEOPLE v WILNEITA SMITH, No. 158053; Court of Appeals No. 343195.

PEOPLE v SHIPPEE, No. 158054; Court of Appeals No. 338737.

PEOPLE v HUBEL, No. 158073; Court of Appeals No. 342579.

KAYE v BURNS, No. 158075; Court of Appeals No. 341643.

PEOPLE v MERCURIO, No. 158076; Court of Appeals No. 341850.

PEOPLE v COTTENHAM, No. 158080; Court of Appeals No. 338449.

PEOPLE v FELDHOUSE, No. 158086; Court of Appeals No. 343175.

PEOPLE v STUCKEY, No. 158087; Court of Appeals No. 343102.

PEOPLE v MANNION, No. 158093; Court of Appeals No. 342768.

PEOPLE v PAUL HOWARD, No. 158095; Court of Appeals No. 342956.

PEOPLE v MASA, No. 158099; Court of Appeals No. 343311.

PEOPLE v JIVIDEN, No. 158100; Court of Appeals No. 342417.

PEOPLE v HARBERT, No. 158106; Court of Appeals No. 343511.

POZDERCA v MAPLE LANE GOLF CLUB, No. 158112; Court of Appeals No. 341709.

PEOPLE v JAMIL CARTER, No. 158113; Court of Appeals No. 343389.

PEOPLE v DEMIREZ LEWIS, No. 158117; Court of Appeals No. 343271.

PEOPLE v WILLIAM SMITH, No. 158118; Court of Appeals No. 338347.

PEOPLE v JAMES, No. 158121; Court of Appeals No. 341315.

PEOPLE v COTTRELL, No. 158122; Court of Appeals No. 343957.

PEOPLE v MCKNIGHT, No. 158128; Court of Appeals No. 343345.

PEOPLE v MARCUS MATTHEWS, No. 158131; Court of Appeals No. 342412.

PEOPLE v ALLERDING, No. 158144; Court of Appeals No. 343479.

PEOPLE v HARP, No. 158145; Court of Appeals No. 342142.

JONES v GUS HARRISON CORRECTIONAL FACILITY WARDEN, No. 158148; Court of Appeals No. 342620.

PEOPLE v RAGLIN, No. 158156; Court of Appeals No. 343658.

PEOPLE v AUTREZ POLLARD, No. 158158; Court of Appeals No. 336700.

PEOPLE v MAGEE, No. 158159; Court of Appeals No. 342434.

PEOPLE v BOBIE GEORGE, No. 158162; Court of Appeals No. 342490.

PEOPLE v ANTHONY SPENCER, No. 158166; Court of Appeals No. 343512.

ALFORD v VHS DETROIT RECEIVING HOSPITAL, INC, Nos. 158186 and 158187; Court of Appeals Nos. 342093 and 342199.

ALFORD v VHS DETROIT RECEIVING HOSPITAL, INC, No. 158192; Court of Appeals No. 342199.

PEOPLE v FISHER, No. 158205; Court of Appeals No. 343619.

PEOPLE v BEATTY, No. 158206; Court of Appeals No. 338376.

PEOPLE v JAMAR EVANS, No. 158207; Court of Appeals No. 343666.

PEOPLE v ANTRELL WILLIAMS, No. 158210; Court of Appeals No. 344101.

PEOPLE v WRIGHT-TRUSSELL, No. 158221; Court of Appeals No. 343784.

PEOPLE v KOPICKO-JONES, No. 158230; Court of Appeals No. 344055.

CONSTANT v DTE ELECTRIC COMPANY, Nos. 158231 and 158232; Court of Appeals Nos. 336620 and 338686.

PEOPLE v LAW, No. 158234; Court of Appeals No. 343588.

PEOPLE v STURDIVANT, No. 158253; Court of Appeals No. 338295.

SPENCER v SPENCER, No. 158254; Court of Appeals No. 342513.

CITY OF DETROIT v CITY OF HIGHLAND PARK, No. 158260; Court of Appeals No. 343405.

PEOPLE v MICHALCZUK, No. 158272; Court of Appeals No. 343457.

PEOPLE v CARL THOMPSON, No. 158283; Court of Appeals No. 343953.

PEOPLE v CLAWSON, No. 158286; Court of Appeals No. 344099.

PEOPLE v BURROWS, No. 158289; Court of Appeals No. 344155.

PEOPLE v KUPINSKI, No. 158291; Court of Appeals No. 328572.

QAFLESHI v LINCOLN GENERAL INSURANCE COMPANY, No. 158340; Court of Appeals No. 335835.

PEOPLE v MORENO, No. 158341; Court of Appeals No. 337458.

PEOPLE v ANTON BROOKS, No. 158354; Court of Appeals No. 336036.

PEOPLE v KENYATTA DAVIS, No. 158384; Court of Appeals No. 344828.

PEOPLE v ROBERT THOMPSON, No. 158434; Court of Appeals No. 344393.

PEOPLE v CHARLES TAYLOR, No. 158496; Court of Appeals No. 336572.

PEOPLE v DERRICK JOHNSON, No. 158566; Court of Appeals No. 328443.

Superintending Control Denied December 4, 2018:

SHIELDS v ATTORNEY GRIEVANCE COMMISSION, No. 157929.

EDWARDS v ATTORNEY GRIEVANCE COMMISSION, No. 157941.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 158055.

BELINDA WILLIAMS v ATTORNEY GRIEVANCE COMMISSION, No. 158107.

TAYLOR v ATTORNEY GRIEVANCE COMMISSION, No. 158379.

Summary Disposition December 5, 2018:

COUNTY OF INGHAM v MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL, No. 156980; reported below: 321 Mich App 574. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the issue raised by the defendant but not addressed by that court during its initial review of this case: Whether, even if the plaintiff counties are successors in interest to their road commissions, the defendant Michigan County Road Commission Self-Insurance Pool nevertheless may, in accordance with its governing documents, decline to issue to the counties refunds of surplus premiums from prior-year contributions. In addressing this question, the Court of Appeals shall consider, among other things, the following documents: the Declaration of Trust, By-Laws, Inter-Local Agreements, MCRCSIP Refund Overview, and the July 19, 1990 memorandum to the Pool members. The court shall address whether these documents are binding on the parties, and, if so, what effect they have on the plaintiffs' entitlement to refunds. We do not retain jurisdiction.

In re PAROLE OF FREDERICK WILKINS, No. 158396; Court of Appeals No. 344426. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted, and we direct that court to decide this case on an expedited basis.

In re JL THOMAS, MINOR, No. 158420; Court of Appeals No. 342183. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to that court. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Wayne Circuit Court for further consideration. The trial court shall determine: (1) whether the trial court ordered a DNA test at Department of Health and Human Services expense, as stated by the referee, and, if so, whether the testing occurred; (2) whether the trial court extended the time for the putative father to establish paternity; and (3) whether the putative father was able to speak at the termination trial by speakerphone and whether he waived any issue regarding the DNA test or the establishment of paternity by not requesting an adjournment. At the conclusion of the hearing, the trial court shall forward the record and its findings to the Court of Appeals, which shall then reconsider these issues and the issues raised by the appellant in his brief on appeal. We do not retain jurisdiction.

Leave to Appeal Denied December 5, 2018:

RAMOS v INTERCARE COMMUNITY HEALTH NETWORK, No. 157494; reported below: 323 Mich App 136.

PEOPLE v JALEN LYONS, No. 157554; Court of Appeals No. 336412.

PEOPLE v SHAYLA TUCKER, No. 157645; Court of Appeals No. 335393.

PEOPLE v AARON SPENCER, Nos. 157711 and 157712; Court of Appeals Nos. 342570 and 342574.

PEOPLE v WESTBROOK, No. 157722; Court of Appeals No. 335161.

PEOPLE v BILLY BENNETT, No. 157793; Court of Appeals No. 333080.

PEOPLE v COHEN, No. 157905; Court of Appeals No. 336183.

MICHIGAN OPPORTUNITY v BOARD OF STATE CANVASSERS, No. 158303; Court of Appeals No. 344619.

PEOPLE v WINBURN, No. 158741; Court of Appeals No. 345980.

Summary Disposition December 7, 2018:

PEOPLE v JUAN DAVIS, No. 157245; Court of Appeals No. 341047. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Berrien Circuit Court, and remand this case to that court for resentencing. The circuit court clearly erred by assigning 50 points under Offense Variable 15 (OV 15), MCL 777.45. The guidelines variables are scored by reference to the record. *People v Osantowski*, 481 Mich 103, 111 (2008). The trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438 (2013). Given the small quantity of the controlled substance at issue, the absence of other indicia of possession with the intent to deliver, the uncontested evidence that the substance was found crushed in the defendant's pocket, his history of substance abuse as evidenced by the presentence investigation report, and the fact that he was not charged with delivery of a controlled substance, the record evidence preponderates in favor of the conclusion that the defendant possessed the controlled substance at issue for personal use, and not with "the intent to deliver . . . in this state," as is required by MCL 777.45(1)(d). Specifically, on this record, the evidence that the one pill at issue was crushed into fragments does not prove by a preponderance of the evidence that the defendant intended to transfer the controlled substance to another individual regardless of remuneration. See MCL 777.45(2)(a). Because the deduction of points erroneously assigned under OV 15 affects the defendant's guidelines range, he is entitled to resentencing. *People v Francisco*, 474 Mich 82 (2006). We do not retain jurisdiction.

Leave to Appeal Denied December 7, 2018:

PEOPLE v HEAD, No. 157799; reported below: 323 Mich App 526. The denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR Subchapter 6.500 that may include his claim that the prosecution failed to give timely notice that the defendant would be subject to a 25-year mandatory minimum under MCL 769.12(1)(a). See MCL 769.13(1); *People v Hornsby*, 251 Mich App 462, 472 (2002); *People v Ellis*, 224 Mich App 752, 755 (1997).

JSR FUNDING, LLC v AVANT, No. 158512; Court of Appeals No. 344681.

MARKMAN, C.J. (*concurring*). I concur in this Court's denial order, as the circuit court correctly concluded that the March 10, 2017 tax payment plan did not constitute a "tax foreclosure avoidance agreement" pursuant to MCL 211.78q(5) and therefore that the redemption period on the property expired on March 31, 2017. However, I note that the form used by the Oakland County Treasurer's Office to enable a tax payment plan may not clearly explain (a) that such plan does not constitute a "tax foreclosure avoidance agreement" pursuant to MCL 211.78q(5), and therefore that it does not extend the period of redemption, and (b) that a single missed payment might under some circumstances result in a taxpayer's eviction from the property. See also *Lancaster & York, LLC v Oakland Co Treasurer*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2017 (Docket No. 333064). I write separately only to suggest that the Treasurer's Office might consider revising its form to more clearly explain the effect of entering into a tax payment plan and the consequences that might arise as a result of even a single missed payment under that plan.

In re MILLER, MINORS, No. 158627; Court of Appeals No. 344202.

In re SIRBAUGH, MINORS, No. 158672; Court of Appeals No. 342369.

Order Denying Motion to Disqualify Entered December 7, 2018:

PEOPLE v GOLDMAN, No. 158319; Court of Appeals No. 342072. On order of the Chief Justice, the motion of defendant-appellant to disqualify all seven Justices from participating in the decision of this case is denied pursuant to the rule of necessity. *United States v Will*, 449 US 200 (1980). The motion to stay or hold in abeyance is denied as moot.

Petition for Interim Suspension Granted December 14, 2018:

In re ANONYMOUS JUDGE BEFORE THE JUDICIAL TENURE COMMISSION, No. 158592. On order of the Court, the motion for immediate consideration is granted. The petition for interim suspension is considered, and it is granted. The Honorable Catherine B. Steenland, Judge of the 39th District Court, is suspended with pay until further order of this Court. In order to expedite the resolution of this matter, should the Judicial Tenure Commission issue a 28-day letter and a formal complaint, we order the Commission and the Master to coordinate their schedules to ensure that the JTC decision and recommendation of action, if any, will be submitted to this Court within nine months of the date of this order. See MCR 9.207(F) and MCR 9.219(A). We also order the JTC to redact all Social Security numbers from its Attachments, which at this time have been filed under seal. In addition, so as to preserve the confidentiality required by MCR 9.219(A)(2) and MCR 9.221(A), with the exception of this order, the Supreme Court file is suppressed and shall remain confidential until further order of this Court.

Leave to Appeal Denied December 14, 2018:

In re JH THARP, MINOR, No. 158603; Court of Appeals No. 342358.

Application for Leave to Appeal Dismissed December 14, 2018:

PEOPLE v BRITTON, No. 158072; Court of Appeals No. 336120. On order of the Court, having received notice that defendant-appellant died during the pendency of this appeal, the application for leave to appeal is dismissed. *People v Peters*, 449 Mich 515 (1995).

Application for Leave to Appeal Dismissed on Stipulation December 14, 2018:

PEOPLE v PATTON, No. 158285; reported below: 325 Mich App 425.

Rehearing Denied December 14, 2018:

MICHIGAN OPEN CARRY, INC v CLIO AREA SCHOOL DISTRICT, No. 155204; reported below: 318 Mich App 356. Opinion at 502 Mich 695.

Summary Disposition December 19, 2018:

PEOPLE v ENCISO, No. 157906; Court of Appeals No. 342965. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Among the issues to be considered, the Court of Appeals shall address whether: (1) a defendant's waiver of the right to be physically present at sentencing is valid only if accomplished on the record, see *People v Palmerton*, 200 Mich App 302 (1993); and (2) a defendant's unpreserved claim regarding his or her lack of physical presence at sentencing is subject to review for plain error. See *People v Heller*, 316 Mich App 314 (2016).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 19, 2018:

PEOPLE v WILLIS, No. 157465; reported below: 322 Mich App 579. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether, to sustain a conviction under MCL 750.145c(2), the prosecution must prove that the defendant acted for the purpose of producing or making child sexually abusive material; and (2) whether the evidence in this case was sufficient to support the defendant's conviction for child sexually abusive activity, MCL 750.145c(2). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1).

The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied December 19, 2018:

THAKUR v CITY OF FARMINGTON HILLS, No. 157652; Court of Appeals No. 336566.

PEOPLE v SHIFFER, No. 157679; Court of Appeals No. 340042.

MUELLER v BRANNIGAN BROTHERS RESTAURANTS AND TAVERNS LLC, No. 157771; reported below: 323 Mich App 566.

PEOPLE v ISAIAH ROBINSON, No. 157999; Court of Appeals No. 337004.

PEOPLE v SHORTER, No. 158177; reported below: 324 Mich App 529.

PEOPLE v GRONDIN, No. 158196; Court of Appeals No. 331809.

In re LEONARD, MINORS, No. 158452; Court of Appeals No. 340557.

Summary Disposition December 21, 2018:

PEOPLE v CLYDE GREEN, No. 156498; Court of Appeals No. 338712. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the defendant was denied the effective assistance of counsel by counsel's failure to advise the defendant that the offense to which he was pleading no contest was a felony. In all other respects, leave to appeal is denied.

PEOPLE v TONY CLARK, No. 157851; Court of Appeals No. 336656. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing the denial of the defendant's request for the appointment of a defense expert in computer forensics, and we remand this case to the Court of Appeals for reconsideration of that issue in light of *People v Kennedy*, 502 Mich 206 (2018). With regard to the defendant's remaining issues concerning the video, leave to appeal is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. In all other respects, leave to appeal is denied.

PEOPLE v WARNER, No. 158208; Court of Appeals No. 343419. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v ANTONIO MATTHEWS, No. 158246; Court of Appeals No. 342377. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for the appointment of substitute appellate counsel, in light of *Halbert v Michigan*, 545 US 605 (2005). Even though defendant's original appellate counsel represented in his motion to vacate the order appointing him that there were no valid grounds for withdrawal of defendant's plea, he did not accompany this motion with a brief "referring to anything in the record that might arguably support the appeal," there is no evidence that defendant was served with counsel's motion and given time "to raise any points that he chooses," and the trial court did not make a finding that the appeal was "wholly frivolous." *Anders v California*, 386 US 738, 744 (1967). On remand, substitute appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate post-conviction motions in the circuit court, within six months of the date of the circuit court's order appointing counsel. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Order Directing Supplemental Briefing December 21, 2018:

PEOPLE v CZUPRYNSKI, No. 158416; Court of Appeals No. 336883. On order of the Court, the application for leave to appeal the August 2, 2018 judgment of the Court of Appeals is considered. We direct the parties to submit supplemental briefs addressing whether the alleged error was harmless within 28 days after the date of this order. See *People v Schaefer*, 473 Mich 418 (2005). The application for leave to appeal remains pending.

Leave to Appeal Denied December 21, 2018:

SEJASMI INDUSTRIES, INC v A+ MOLD, INC, No. 156341; Court of Appeals No. 336205. On October 9, 2018, the Court heard oral argument on the application for leave to appeal the July 27, 2017 order and the April 5, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. Plaintiff Sejasmi Industries contracted with defendant A+ Mold, Inc. (doing business as Takumi Manufacturing) for the construction of several molds for the fabrication of plastic parts by plaintiff. Takumi in turn contracted with defendant Quality Cavity for it to perform some of the construction work. The molds were duly constructed and delivered to plaintiff. Plaintiff then paid Takumi on a timely basis; however, Takumi failed to pay defendant in full. Consequently, defendant sought to enforce its statutory moldbuilder's

liens against the molds possessed by plaintiff, see MCL 445.619, and plaintiff filed a declaratory action seeking a court order stating that the liens had been extinguished. The trial court granted summary disposition in favor of plaintiff, and the Court of Appeals affirmed in part and remanded to the trial court for further proceedings in a split decision, with Judge HOEKSTRA dissenting in part. *Sejasmi Indus, Inc v A+ Mold, Inc*, unpublished per curiam opinion of the Court of Appeals, issued April 5, 2016 (Docket No. 328292). This Court then scheduled oral argument on defendant's application for leave to appeal. 501 Mich 968 (2018).

This case concerns statutory protections for moldbuilders in the tool-and-die industry, in particular the proper understanding of MCL 445.619, which establishes a nonpossessory moldbuilder's lien. This provision is a part of the statutory scheme set forth by 2002 PA 17, which added MCL 445.611 through MCL 445.620c to 1981 PA 155 as amended by 1986 PA 103, entitled "An act to provide for ownership rights in dies, molds, and forms for use in the fabrication of plastic parts under certain conditions and to establish a lien on certain dies, molds, and forms." The provisions within the act specifically concerning moldbuilder's liens are MCL 445.619 through MCL 445.620c. The remaining provisions are not directly relevant here.

To better understand why the Legislature enacted MCL 445.619—a law that remains unexamined by this Court in the 16 years since its enactment in 2002—I find helpful the *amicus curiae* brief filed by the American Mold Builders Association, explaining as the rationale for the law that "prior to the 2002 lien law, mold and tool builders had a practice of waiting until an unpaid tool came back to the toolmaker for service, or engineering changes, and then holding it hostage until the molder . . . paid past-due balances." *Amicus Curiae* Brief of the American Mold Builders Association et al, p 7. "Granting a nonpossessory lien virtually stopped that practice overnight, for those toolmakers that took the time to file liens, resulting in fewer disruptions to the supply chain." *Id*. "The tooling company . . . can [now] charge less for the mold or tool, begin production sooner, and accept deferred payment arrangements, all of which allow for faster time to market and lower pricing for the supply chain and ultimately the end consumer." *Id*. Put simply, MCL 445.619 not only protects moldbuilders by establishing security for payment through a nonpossessory lien, but also provides benefits for the tool-and-die industry as a whole.

With that in mind, MCL 445.619 sets forth the creation and attachment of a moldbuilder's lien:

> (1) A moldbuilder shall permanently record on every die, mold, or form that the moldbuilder fabricates, repairs, or modifies the moldbuilder's name, street address, city, and state.
>
> (2) A moldbuilder shall file a financing statement in accordance with the requirements of [MCL 440.9502].
>
> (3) A moldbuilder has a lien on any die, mold, or form identified pursuant to subsection (1). *The amount of the lien is the amount that a customer or molder owes the moldbuilder for the*

> *fabrication, repair, or modification of the die, mold, or form*. The information that the moldbuilder is required to record on the die, mold, or form under subsection (1) and the financing statement required under subsection (2) shall constitute actual and constructive notice of the moldbuilder's lien on the die, mold, or form.
>
> (4) The moldbuilder's lien attaches when actual or constructive notice is received. The moldbuilder retains the lien that attaches under this section even if the moldbuilder is not in physical possession of the die, mold, or form for which the lien is claimed.
>
> (5) The lien remains valid until the first of the following events takes place:
>
> (a) The moldbuilder is paid the amount owed by the customer or molder.
>
> (b) *The customer receives a verified statement from the molder that the molder has paid the amount for which the lien is claimed.*
>
> (c) The financing statement is terminated. [Emphasis added.]

Here, the parties do not dispute that Takumi is the "customer," defendant the "moldbuilder," and plaintiff the "molder." See MCL 445.611(a) through (c). Nor do the parties dispute that defendant possessed valid liens against the molds because the requirements of MCL 445.619(1), (2), and (4) had been satisfied. The sole issue is whether the liens possessed by defendant were extinguished pursuant to MCL 445.619(5)(b) when plaintiff sent a "verified statement" to Takumi indicating that plaintiff had paid Takumi for the construction of the molds. That is, the issue is whether the "customer receive[d] a verified statement from the molder that the molder has paid the amount for which the lien is claimed." Plaintiff contends that MCL 445.619(5)(b) does not require a verified statement that payment was made to the *moldbuilder* for the lien amount, while defendant argues that the provision does, in fact, require such a statement. For the following reasons, I agree with defendant that MCL 445.619(5)(b) requires a verified statement that payment was made to the *moldbuilder* for the lien amount.

First, while it is true that MCL 445.619(5)(b) does not explicitly identify to whom the payment must be made by the molder, when that section is read in its entirety, it is apparent that MCL 445.619(5)(b) requires a verified statement that payment was made to the *moldbuilder* for the lien amount. In particular, MCL 445.619(3) states in relevant part that "[t]he amount of the lien is the amount that a customer or molder owes the moldbuilder" for the mold. That is, "the amount" refers to the amount owed to the moldbuilder. This makes sense, as the entirety of this statute, MCL 445.619, concerns the subject of moldbuilder's liens. Furthermore, although "paid" is not specifically defined in the statute, the pertinent definition is "to [have] discharge[d] or settle[d] (a debt, obligation, etc.), as by transferring money or goods, or by doing something." *Random House Webster's College Dictionary* (2001). Consequently, for a molder to have "paid the amount for which the lien is claimed," it must have discharged a debt to the moldbuilder.

Thus, where MCL 445.619(5)(b) refers to a statement that "the molder has paid the amount," it seems best understood to refer to a statement that the molder has paid the amount owed to the moldbuilder for the mold. This undisputedly did not occur here.

Second, when interpreting statutes, "the entire act must be read and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Detroit Trust Co v Hartwick*, 278 Mich 139, 148 (1936), quoting *Grand Rapids v Crocker*, 219 Mich 178, 182-183 (1922). Here, taking a slightly broader look at the context of the statute of which MCL 445.619(5)(b) is a part, this too seems to contemplate payment to the moldbuilder. MCL 445.620 provides that to enforce a lien acquired under MCL 445.619, the moldbuilder must provide notice to the customer and the molder stating that "a lien is claimed, the amount that the moldbuilder claims it is owed for fabrication, repair, or modification of the die, mold, or form, and a *demand for payment*." (Emphasis added.) There can be little doubt that a "demand for payment" by the moldbuilder pertains to payment of the amount owed to the moldbuilder itself. And MCL 445.620a further provides that "if the *moldbuilder has not been paid the amount claimed in the notice* . . . within 90 days . . . , the moldbuilder has a right to possession of the die, mold, or form . . . ." (Emphasis added.) MCL 445.620a thus also seemingly contemplates payment to the moldbuilder. Furthermore, MCL 445.620c(1) provides that "[i]f the proceeds of the sale are greater than the amount of the lien, the proceeds shall first be paid to the *moldbuilder in the amount necessary to satisfy the lien*. All proceeds in excess of the lien shall be paid to the customer." (Emphasis added.) Once again, MCL 445.620c(1) seemingly and altogether logically contemplates payment to the moldbuilder. Put simply, if MCL 445.619(5)(b) did not contemplate payment to the moldbuilder, it would stand alone as the only provision within a statutory scheme concerning moldbuilder's liens that contemplated payment to someone *other* than the moldbuilder.

In concluding otherwise, the Court of Appeals reasoned that if MCL 445.619(5)(b) required a verified statement that the moldbuilder had been paid in full, then that provision would be duplicative. *Sejasmi*, unpub op at 5 ("To require, as suggested by [defendant], that the verified statement in subsection (5)(b) submitted by the molder to the customer must indicate that the molder paid the moldbuilder would be merely a duplication of and an additional step effectuating subsection (5)(a) rather than a separate and distinct mechanism to invalidate the lien . . . ."). That is, according to the Court of Appeals' understanding of defendant's argument, MCL 445.619(5)(a) would require that the moldbuilder had been paid in full and MCL 445.619(5)(b), immediately following, would require that the moldbuilder had been paid in full *and* that the customer had received a verified statement of that fact. Consequently, the receipt of a verified statement by the customer would never be a relevant occurrence in actually extinguishing a lien because such lien necessarily would already have been extinguished by the preceding circumstance that the moldbuilder had been paid in full.

Thus, according to the Court of Appeals, MCL 445.619(5)(b) would serve no purpose in the overall statutory scheme because the lien would already have been extinguished under MCL 445.619(5)(a).

Respectfully, the Court of Appeals' reasoning here is flawed because it fails to recognize the industry-specific purpose of MCL 445.619(5)(b). "When an OEM [original equipment manufacturer, i.e., a customer such as an automobile manufacturer] contracts with a tier-1 supplier [i.e., a molder], the contract often requires that the tier-1 provide legal documentation that there are no liens on the mold or tool." Amicus Curiae Brief of the American Mold Builders Association at 9.[1] "This ensures there will be no interruptions in the supply chain later from a foreclosure on the lien." *Id*. In some cases, however, even when the molder has fully paid the moldbuilder for the mold, the moldbuilder will fail or refuse to acknowledge that the lien has or should be extinguished. See *id*. That is, the moldbuilder will not cooperate with the molder by confirming in writing that it has been "paid the amount owed," MCL 445.619(5)(a), or by terminating the financing statement, see MCL 445.619(5)(c). Perhaps, for example, the moldbuilder believes that it is owed more money for the mold. See Amicus Curiae Brief of the American Mold Builders Association at 15. In such a case, the molder need not sue the moldbuilder to establish that the lien has been extinguished to satisfy its contract with the OEM. *Id*. at 9. Rather, under MCL 445.619(5)(b), "[o]nce the molder has paid the moldbuilder for the lien, it can confirm to the OEM . . . that the lien is extinguished by sending the verification, and the OEM can rely on that verification because the verification itself extinguishes the lien by operation of law." Amicus Curiae Brief of the American Mold Builders Association at 9. Stated otherwise, once "[t]he customer receives a verified statement from the molder that the molder has paid the amount for which the lien is claimed," MCL 445.619(5)(b), the lien is extinguished, and the molder and the moldbuilder can litigate any dispute in court without the threat of an interruption in the supply chain because of a foreclosure on the lien. Put simply, it appears that the purpose of MCL 445.619(5)(b) is to facilitate commerce in the tool-and-die industry even when the moldbuilder fails or refuses to acknowledge that it has been paid in full and that the lien is accordingly extinguished. Because the Court of Appeals did not recognize that MCL 445.619(5)(b) has a purpose independent from MCL 445.619(5)(a), its analysis of the former provision was deficient.

Moreover, an assessment of the Court of Appeals' reasoning further illustrates the flaw in its interpretation. MCL 445.619(5)(a) does not

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[1] I recognize that in this particular case, the "customer" is not the end-user of the molded parts, such as an automobile manufacturer that uses molded parts to build an automobile. However, in most instances, "[t]he customer is . . . the manufacturer desiring an end product made by the molder using a mold." Amicus Curiae Brief of the American Mold Builders Association at 16. "The money for the mold typically flows from the customer to the molder and then to the moldbuilder . . . ." *Id*.

explicitly specify to whom the "amount" is owed. Rather, it is only *implicit* within MCL 445.619(5)(a) that the "amount" is owed to the moldbuilder. That is, although MCL 445.619(5)(a) only explicitly states that the lien is extinguished when the "moldbuilder is paid the amount owed by the customer or molder," it means that the lien is extinguished when the "moldbuilder is paid the amount owed to the *moldbuilder* by the customer or molder." The Court of Appeals thus had no difficulty in understanding MCL 445.619(5)(a) to include such an implicit limitation, yet failed to recognize that MCL 445.619(5)(b) encompasses the same implicit limitation.

The Court of Appeals also reasoned that interpreting MCL 445.619(5)(b) as requiring a verified statement that payment has been made to the moldbuilder would "read into the statutory provision language that is absent." *Sejasmi*, unpub op at 5. I respectfully disagree. "[T]he Legislature is not required to be overly repetitive in its choice of language." *Robinson v City of Lansing*, 486 Mich 1, 16 (2010). See also *Rock v Crocker*, 499 Mich 247, 266 (2016) ("[I]t was unnecessary for the Legislature to repeat the phrase 'the time of the occurrence' in every instance given that the context of MCL 600.2169(1)(a), (b), and (c) makes it clear that the time of the occurrence is the relevant point in time."). As already explained, MCL 445.619, as well as the broader context of the statute concerning moldbuilder's liens, contemplates payment to the moldbuilder. The Legislature was not required to repeat "to the moldbuilder" throughout the statute, when the context sufficiently makes clear that payment "to the moldbuilder" is the obvious and manifest subject of these provisions. Indeed, if the Court of Appeals was correct that MCL 445.619(5)(b) did not contemplate payment to the moldbuilder, there would then be no textual or otherwise principled reason why a moldbuilder's lien could not be extinguished under that provision whenever a customer receives a verified statement from the molder that it has paid the amount for which the lien is claimed to *anyone*. For example, if the moldbuilder claimed a lien in the amount of $100,000, a verified statement from the molder to the customer that the molder has paid $100,000 in taxes to the federal government would apparently extinguish the lien by the Court of Appeals' reasoning since that amount constitutes "the amount for which the lien is claimed." Such an interpretation of MCL 445.619(5)(b), however, is obviously absurd and unreasonable and contrary to the principle that "[w]hen undertaking statutory interpretation, the provisions of a statute should be read reasonably and in context." *McCahan v Brennan*, 492 Mich 730, 739 (2012).

Adhering to the reasoning of the Court of Appeals, which suggests that any statutory reference to payment must expressly identify the party to whom the payment must be made, would lead to other peculiar and potentially chaotic outcomes concerning liens in the tool-and-die industry. In addition to cases such as the instant one, in which a moldbuilder's lien can be extinguished by a molder without the moldbuilder having received any payment or notice, consider MCL 445.618, which states concerning the molder's lien:

> A molder has a lien, dependent on possession, on any die, mold, or form in the molder's possession belonging to a customer for the amount due the molder from the customer for plastic fabrication work performed with the die, mold, or form. A molder may retain possession of the die, mold, or form until the *amount due is paid*. [Emphasis added.]

It strikes me as reasonably clear that the molder retains a possessory lien until the amount due *to the molder* has been paid. However, because MCL 445.618 also does not explicitly specify to whom the amount due must be paid, the possessory lien is again seemingly extinguished whenever anyone has been paid the amount due, at least according to the reasoning of the Court of Appeals. I respectfully submit that no reasonable person would interpret MCL 445.618 in such an odd manner. Instead, when MCL 445.618 is also read reasonably and in context, it is clear that payment is again contemplated to the molder. And I discern no principled reason why MCL 445.619(5)(b) should be interpreted any differently. When that statute is read reasonably and in context, it is clear that it contemplates payment to the moldbuilder.

As a consequence of our decision not to correct what I view as the incorrect opinion below, it will stand as the only authority of this state concerning MCL 445.619(5)(b). Moldbuilders will as a result be left in a position of uncertainty in which their nonpossessory liens may be unilaterally extinguished by the molder absent payment or even notice being made to the moldbuilder, despite the commands of an industry-focused statute designed to afford specific lien protections to those engaged in this industry. Such an outcome, I believe, is inconsistent with the Legislature's intentions in MCL 445.619 to afford actual, not illusory, protections for participants in the industry that is the subject of this provision. Accordingly, I respectfully dissent from this Court's order of denial and instead would reverse the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with the analysis herein.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case

PEOPLE v JASON CARTER, No. 156457; Court of Appeals No. 338136.

PEOPLE v SHEPHERD, No. 157162; Court of Appeals No. 339039.

PEOPLE v GRESHAM, No. 157238; Court of Appeals No. 340887.

PEOPLE v CASPER, No. 157318; Court of Appeals No. 335316.

PEOPLE v CAMEL, No. 157347; Court of Appeals No. 338787.

PEOPLE v LARRY HOUSTON, Nos. 157374 and 157375; Court of Appeals Nos. 341909 and 341911.

PEOPLE v FRITZ, No. 157519; Court of Appeals No. 340277.

PEOPLE v DUFFINEY, No. 157676; Court of Appeals No. 333378.

PEOPLE v COX, No. 157680; Court of Appeals No. 340964.

SOTTILE v COUNTY OF MONROE, No. 157700; Court of Appeals No. 337260.

RATZA v AJE, LLC, No. 157755; Court of Appeals No. 342968.

PEOPLE v DEANDRE JONES, No. 157763; Court of Appeals No. 342361.

RAY v CITY OF LANSING, No. 157845; Court of Appeals No. 337058.

PEOPLE v FOREMAN, No. 157852; Court of Appeals No. 342491.

PEOPLE v DAVID DAVIS, No. 157872; Court of Appeals No. 335051.

PEOPLE v EDWARDS, No. 157881; Court of Appeals No. 341475.

PEOPLE v MERRIWEATHER, No. 157889; Court of Appeals No. 341232.

PEOPLE v GOLLMAN, No. 157922; Court of Appeals No. 334402.

CONSUMERS ENERGY COMPANY v ADRIAN & BLISSFIELD RAIL ROAD COMPANY, No. 157926; Court of Appeals No. 341216.

WOODWARD v SCHWARTZ, No. 157953; Court of Appeals No. 337984.

PEOPLE v WHEELER, No. 157970; Court of Appeals No. 327634.

CROWN ENTERPRISES, INC v STATE OF MICHIGAN, No. 157971; Court of Appeals No. 340039.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

PEOPLE v DANIEL WOOD, No. 157972; Court of Appeals No. 335131.

PEOPLE v LEIGH, No. 157983; Court of Appeals No. 335883.

PEOPLE v PARSLEY, No. 157995; Court of Appeals No. 327924.

PEOPLE v WILEY and PEOPLE v RUCKER, Nos. 158019 and 158020; reported below: 324 Mich App 130.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal because I agree with the Court of Appeals dissent that the ex post facto issue here was not properly before the Court of Appeals. Therefore, I would vacate the part of the Court of Appeals judgment that addresses this issue.

Following jury trials in the 1990s, 16-year-old defendant Christopher Wiley and 17-year-old defendant William Rucker were convicted of first-degree murder and possessing a firearm during the commission of a felony, and each was sentenced to life without parole. After *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718 (2016), were decided by the United States Supreme Court and MCL 769.25a was enacted, defendant Wiley was resentenced to 25 to 60 years' imprisonment and defendant Rucker was resentenced to 30 to 60 years' imprisonment. In a published and split decision, the Court of Appeals held that MCL 769.25a(6), pertaining to good-time and

disciplinary credits, was unconstitutional.[1] Specifically, the Court of Appeals held that MCL 769.25a(6) violates the federal and state Ex Post Facto Clauses because Michigan's statutory scheme allowed defendants to earn good-time and disciplinary credits at the time defendants' crimes were committed and the elimination of such credits in MCL 769.25a(6) increased defendants' punishments. The dissenting judge, however, concluded that the ex post facto issue was not properly before the Court of Appeals because "the sole issue raised is whether a nonparty (the Parole Board or the Michigan Department of Corrections (MDOC)) may—*in the future*—constitutionally apply MCL 769.25a(6) to the unchallenged sentences imposed by the trial court" and that as a result defendants are not "aggrieved parties" under MCR 7.203(A) because they are not seeking relief from their sentences as imposed by the trial court. *People v Wiley*, 324 Mich App 130, 168-169, 176 (2018) (BOONSTRA, J., concurring in part and dissenting in part) (emphasis added).[2] I agree with Judge BOONSTRA.

MCR 7.203(A) provides, in pertinent part, "The court [of appeals] has jurisdiction of an appeal of right filed by an aggrieved party . . . ." Defendants here are not arguing that the trial court violated the Ex Post Facto Clauses; rather, they are arguing that the MDOC or the Parole Board *may* violate the Ex Post Facto Clauses in the future if they apply MCL 769.25a(6) at that time. In other words, defendants are not arguing that they have been aggrieved by the trial court's sentencing orders; instead, they are concerned that they might be aggrieved in the future by the MDOC or the Parole Board if they apply MCL 769.25a(6). Accordingly, the issue is simply not ripe and defendants were not in any way aggrieved by the trial court orders. See *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 292 (2006) ("[A] litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case.").

Indeed, both parties recognized this truism at one point or another while this case was pending in the Court of Appeals. In response to defendants' appeals in the Court of Appeals, the prosecutor argued that the issue was not ripe. And in response to the prosecutor's briefs on appeal, both defendants moved to voluntarily dismiss their appeals.

However, when the Attorney General took over representation on behalf of the prosecutor, he opposed defendants' motions, contending that defendants had moved to dismiss their appeals only because of the pendency of a related class action challenge in federal court. The Court

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[1] MCL 769.25a(6) provides: "A defendant who is resentenced under subsection (4) shall be given credit for time already served, but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence."

[2] Judge BOONSTRA concurred in the majority's decision to the extent it held that defendant Rucker's resentencing did not violate the Sixth Amendment.

of Appeals then denied these motions. Furthermore, at oral arguments in that court, counsel for defendants agreed with the prosecutor's initial argument that the issue was not ripe.

Because I agree with the Court of Appeals dissent that the ex post facto issue is not ripe and that defendants were not aggrieved parties in the Court of Appeals, i.e., they were not aggrieved or harmed by the trial court's sentencing orders, I would vacate the part of the Court of Appeals opinion addressing the ex post facto issue.

Finally, if the ex post facto issue *were* properly before this Court, I would grant leave to appeal rather than simply deny leave. The Court of Appeals has struck down a Michigan statute on the grounds that it violates both the federal and state Constitutions. When a lower court strikes down an enactment of the Legislature as unconstitutional, this Court, the highest court of our state, should as a general proposition carefully review that decision because "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Sanders*, 495 Mich 394, 404 (2014).

ZAHRA and WILDER, JJ., join the statement of MARKMAN, C.J.

PEOPLE v DAVID FARRIS, No. 158023; Court of Appeals No. 337821.

PEOPLE v ELAM, No. 158050; Court of Appeals No. 341993.

PEOPLE v OLIVER, No. 158091; Court of Appeals No. 339826.

PEOPLE v KEIGLEY, No. 158105; Court of Appeals No. 336887.

WILLIAMS v CITY OF EAST LANSING, Nos. 158109 and 158110; Court of Appeals Nos. 335467 and 335662.

PEOPLE v BOYLAN, No. 158120; Court of Appeals No. 335556.

PEOPLE v MATTHEW MILLER, No. 158126; Court of Appeals No. 335888.

PEOPLE v LINDSEY, No. 158136; Court of Appeals No. 343392.

SMITH v SDI EXTERIOR SYSTEMS, LLC, No. 158152; Court of Appeals No. 341235.

PEOPLE v BRUCE WILLIAMS, No. 158160; Court of Appeals No. 343150.

PEOPLE v NELSON SCOTT, No. 158161; reported below: 324 Mich App 459.

PEOPLE v PERRY, No. 158163; Court of Appeals No. 342572.

PEOPLE v MANUEL, No. 158164; Court of Appeals No. 342544.

PEOPLE v MICHAEL JACKSON, No. 158168; Court of Appeals No. 336486.

COMMUNITY GARAGE INC v AUTO-OWNERS INSURANCE COMPANY, No. 158170; Court of Appeals No. 339300.

PEOPLE v JAMES COOK, No. 158174; Court of Appeals No. 339626.

PEOPLE v TENELSHOF, No. 158183; Court of Appeals No. 343589.

PEOPLE v CHOICE, No. 158189; Court of Appeals No. 341787.

SAGGIO v MUELLER INDUSTRIES, INC, No. 158190; Court of Appeals No. 343610.

PEOPLE v CISCO GREEN, No. 158199; Court of Appeals No. 331411.

GIURA v SAINT CLAIR DISPOSAL, INC, No. 158209; Court of Appeals No. 342070.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v PHILIP HICKS, No. 158216; Court of Appeals No. 336959.

PEOPLE v JERRY DANIELS, No. 158218; Court of Appeals No. 343689.

PEOPLE v GORDON, No. 158233; Court of Appeals No. 339785.

PEOPLE v SHERMAN, No. 158237; Court of Appeals No. 335973.

PEOPLE v DEJOHN, No. 158241; Court of Appeals No. 335583.

SMITH v AUTOMOBILE CLUB INSURANCE ASSOCIATION OF AMERICA, No. 158242; Court of Appeals No. 337924.

PEOPLE v SIKORSKI, No. 158251; Court of Appeals No. 337572.

BUCHESKY v HEARTLAND-OAKLAND MI, LLC, Nos. 158255 and 158256; Court of Appeals Nos. 342400 and 342630.

TRZCINSKI v KELLY SERVICES, INC, No. 158268; Court of Appeals No. 341986.

PEOPLE v CASTRO-GARAY, No. 158287; Court of Appeals No. 344141.

PEOPLE v BEARD, No. 158288; Court of Appeals No. 343499.

PEOPLE v COAKLEY, No. 158297; Court of Appeals No. 337318.

FEDERAL NATIONAL MORTGAGE ASSOCIATION v BRUKWINSKI, No. 158299; Court of Appeals No. 343969.

YU v MIGLIAZZO, No. 158312; Court of Appeals No. 338847.

PEOPLE v SHAW, No. 158314; Court of Appeals No. 337313.

PEOPLE v ANTHONY GATES, No. 158324; Court of Appeals No. 343707.

PEOPLE v CHU, No. 158328; Court of Appeals No. 344382.

PEOPLE v PARTEE, No. 158330; Court of Appeals No. 343910.

PEOPLE v COSBY, No. 158338; Court of Appeals No. 342438.

PEOPLE v PRITT, No. 158344; Court of Appeals No. 343831.

PEOPLE v HONG, No. 158356; Court of Appeals No. 342950.

HAR-TZION v SAGI, No. 158362; Court of Appeals No. 336711.

PEOPLE v CODY SIMMONS, No. 158363; Court of Appeals No. 332479.

PEOPLE v LANGLOIS, No. 158371; reported below: 325 Mich App 236.

PEOPLE v RICHARD THOMAS, No. 158374; Court of Appeals No. 337315.

PEOPLE v LAWSON, No. 158378; Court of Appeals No. 343947.

PEOPLE v STRANGE, No. 158398; Court of Appeals No. 344125.

PEOPLE v JIMENEZ-VALDEZ, No. 158413; Court of Appeals No. 344290.

PEOPLE v JUSTIN JOHNSON, No. 158481; Court of Appeals No. 335014.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

SAGGIO v MA INDUSTRIAL JV LLC, No. 158505; Court of Appeals No. 343602.

PEOPLE v DEARDOFF, No. 158550; Court of Appeals No. 344660.

PEOPLE v BLAIN, No. 158574; Court of Appeals No. 343464.

In re WOODS/BRYANT, MINORS, No. 158623; Court of Appeals No. 345468.

Superintending Control Denied December 21, 2018:

GURSTEN v ATTORNEY GRIEVANCE COMMISSION, No. 158137.

MCCORMACK, J., did not participate because she may have independent knowledge regarding this case.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceedings.

Leave to Appeal Denied December 27, 2018:

PEOPLE v KAVANAUGH, No. 156408; Court of Appeals No. 330359. On November 19, 2018, the Court heard oral argument on the application for leave to appeal the July 6, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied.

WILDER, J. (*concurring in part and dissenting in part*). I concur in denying appellant's application for leave to appeal, but dissent from the majority's decision to leave intact those aspects of the published Court of Appeals opinion holding or implying that when the trial court's findings are based in part on facts established by video evidence, a trial court's factual findings are entitled to less deference on appellate review. Instead, I would reiterate that factual findings of the trial court are reviewed for clear error. MCR 2.613(C); *People v Bylsma*, 493 Mich 17, 26 (2012) ("A ruling is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.") (quotation marks and citation omitted).

The Court of Appeals judgment states in part that "we need not rely on the trial court's conclusions as to what the videotape contains."

People v Kavanaugh, 320 Mich App 293, 298 (2017). In the present case, the trial court declined to review the video before ruling on defendant's motion to suppress. It is also unclear from the record the degree to which the trial court relied on the video evidence in denying defendant's renewed motion to suppress. In my judgment, because there is uncertainty regarding whether the trial court made factual findings based on the video, to the extent the trial court's factual findings were based on the video, the Court of Appeals could not have reviewed those factual findings for clear error. Therefore, the Court of Appeals' assertion that it "need not rely on the trial court's conclusions as to what the videotape contains" is obiter dictum that creates confusion about the appropriate standard of review of trial court factual findings. I believe that this statement is best vacated to avoid allowing an erroneous statement of law to have precedential effect pursuant to MCR 7.215(C)(2).

MARKMAN, C.J., joins the statement of WILDER, J.

PEOPLE v BUTSINAS, No. 157388; Court of Appeals No. 327799.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. The Court of Appeals in a split decision held that defendant was entitled to a new trial because the prosecutor violated his duty to disclose exculpatory and impeachment evidence to the defense under *Brady v Maryland*, 373 US 83 (1963), by failing to disclose two reports that had been prepared by Child Protective Services (CPS) in 2010 and 2013 concerning alleged sexual abuse by defendant. *People v Butsinas*, unpublished per curiam opinion of the Court of Appeals, issued January 23, 2018 (Docket Nos. 327796 and 327799). Judge O'BRIEN dissented with respect to the granting of a new trial, concluding that it was "not necessary because the reports are not material when viewed in totality." *Butsinas*, unpub op at 2 (O'BRIEN, J., concurring in part and dissenting in part).

"[T]he components of a 'true *Brady* violation,' are that: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150 (2014). "To establish materiality, a defendant must show that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Id.*, quoting *United States v Bagley*, 473 US 667, 682 (1985). I do not address at this time whether knowledge of the CPS reports should be imputed to the prosecutor for the purposes of the first *Brady* component, see *Kyles v Whitley*, 514 US 419, 437 (1995) (explaining that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case"),[1] nor do I address whether the CPS reports were "favorable to the accused," because for

[1] Caselaw from other jurisdictions suggests that it is far from settled that CPS is an agent of the prosecutor for the purposes of *Brady*. See, e.g., *Harm v State*, 183 SW3d 403, 407 (Tex Crim App, 2006) ("CPS is charged with protecting the welfare and safety of children in the community. This duty may entail the investigation of child-abuse claims, but that alone does not automatically transform CPS case

the reasons thoroughly explained by Judge O'BRIEN, the third component, the requirement of materiality, was not satisfied here.

Concerning the 2010 CPS report, which indicates that the victim failed to inform CPS during that investigation that she had been abused by defendant, I fail to discern how defendant would have been acquitted had defense counsel been in possession of this report largely because the information therein is cumulative to the information presented at trial given that *all* witnesses, including the victim herself, agreed that she never disclosed such abuse to anyone at the time. Furthermore, the victim's sister testified at trial that she had filed a complaint with CPS around 2010 regarding defendant and that nothing resulted from her complaint. Indeed, during closing arguments, defense counsel observed that if a complaint had been filed with CPS by the victim's sister, defendant was presumably vindicated. Given these circumstances, the jury likely inferred that CPS interviewed the victim around 2010 and she did not disclose that defendant was abusing her.

In concluding that possession of the 2010 CPS report would have aided the defense, the Court of Appeals reasoned that defense counsel "likely would have" presented a witness "to educate the jury regarding the techniques routinely employed to elicit truthful information in similar circumstances" and that such a witness "could have" been used by defense counsel to illustrate for the jury "the general accuracy and

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workers into law-enforcement officers or state agents."); *People v Terry*, 19 App Div 3d 1039, 1039 (2005) ("[T]he [CPS] report itself, if indeed one exists, is not *Brady* material because the prosecutor never possessed it.").

Furthermore, with regard to the "suppression" aspect of the first *Brady* component, I note that defense counsel indicated during the *Ginther* hearing that he had been aware of the existence of the CPS reports and that those, in fact, may have been obtained by defendant prior to trial because he was "[a] person named in the report or record as a perpetrator or alleged perpetrator of the child abuse . . . ." MCL 722.627(2)(f); see also *People v Ginther*, 390 Mich 436 (1973). See also Michigan Department of Health and Human Services, *Services Requirements Manual*, SRM 131 (September 1, 2015), pp 14, 16 (providing that "children's protective services case information or records" may be released to "[a] person named in a children's protective services investigation report as a perpetrator or alleged perpetrator of child abuse or neglect"), available at <https://dhhs.michigan.gov/OLMWeb/ex/SR/Mobile/SRM/SRM%20Mobile.pdf> (accessed December 20, 2018) [https://perma.cc/N4YT-PY8J]. While it is true that "a diligence requirement is not supported by *Brady* or its progeny," *Chenault*, 495 Mich at 146, it is also true that "evidence that the defense *knew* of favorable evidence will reduce the likelihood that the defendant can establish that the evidence was suppressed for purposes of a *Brady* claim," *id*. at 155 (emphasis added). The Court of Appeals engaged in no significant analysis concerning whether one or both of the CPS reports were genuinely "suppressed" by the prosecutor.

reliability of forensic interviews and interviewing techniques." *Butsinas*, unpub op at 11. However, as defendant himself acknowledges in his answer to the prosecutor's application for leave to appeal, "[t]he defense [in fact] presented Katherine Okra as an expert in forensic interview protocol," and Dr. Okra testified at length about that protocol. And as explained previously, the jury likely inferred that the victim had been interviewed by CPS in 2010, but that she did not disclose the abuse to CPS at that time. That is, the jury likely inferred that the victim did not disclose the abuse despite the forensic interview protocol. Consequently, the hypothetical offered by the Court of Appeals actually occurred at trial—a witness apprised the jury concerning forensic interview protocol—and it is thus unwarranted to grant a new trial in large part so that defendant can present the same evidence once more.

Concerning the 2013 CPS report, that report would likely have been even less helpful to the defense than the 2010 CPS report. First, the 2013 CPS report contradicted a police officer's testimony concerning the reason why the victim was not interviewed at Care House in 2013, but I fail to discern the significance of this contradiction in assessing whether defendant was guilty of the charged offenses. Second, the report indicated that the victim told the police that she had been sexually abused during the day, whereas she testified at trial that she was sexually abused at night. In my judgment, this is a relatively minor detail that would not have been given significant weight by the jury, given that the sexual assaults occurred both repeatedly and several years earlier. Third, the report indicated that the victim's sister disliked defendant, but this fact was also minimally relevant because the entire case was predicated on the *victim's* allegations. Put simply, as Judge O'BRIEN observed, the 2013 CPS report only includes "inconsequential pieces of impeachment evidence, which do not, in any conceivable way, undermine confidence in the jury verdict." *Butsinas*, unpub op at 3 (O'BRIEN, J., concurring in part and dissenting in part).

To summarize, the CPS reports here were not "material" under *Brady* and the Court of Appeals erred by concluding otherwise. Accordingly, I would reverse the Court of Appeals' ruling that defendant was entitled to a new trial on the basis of the alleged *Brady* violation and remand to that court to address defendant's remaining arguments that have not yet been addressed.

ZAHRA and WILDER, JJ., join the statement of MARKMAN, C.J.

PEOPLE v BUTSINAS, No. 157492; Court of Appeals No. 327796.

Leave to Appeal Denied January 9, 2019:

PEOPLE v WOLSCHLAGER, No. 158881; Court of Appeals No. 346727.

Leave to Appeal Granted January 16, 2019:

PEOPLE v JEMISON, No. 157812; Court of Appeals No. 334024. The parties shall address whether permitting an expert witness to testify by

two-way interactive video, over the defendant's objection, denied the defendant his constitutional right to confront witnesses and, if so, whether this error was harmless. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Richard D. Friedman, who submitted an amicus curiae brief in support of the defendant's application for leave to appeal, is also invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

VIVIANO, J., not participating due to a familial relationship with a circuit court judge involved in this case.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered January 16, 2019:

PEOPLE v JAMAL BENNETT, No. 157936; Court of Appeals No. 328759. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred in concluding: (1) that the preserved error in admitting the rap videos was not outcome-determinative; (2) that the unpreserved error in admitting the gang-affiliation testimony was not plain error; and (3) that the erroneously admitted evidence, in conjunction with the prosecutor's argument in closing that this evidence showed the "mentality" of defendant and his friends and the "lifestyle" they lived, did not constitute impermissible character evidence under MRE 404(a) and *People v Bynum*, 496 Mich 610 (2014).

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied January 16, 2019:

LAFAVE v IONIA COUNTY ROAD COMMISSION CHAIRPERSON, No. 157398; Court of Appeals No. 336004.

PEOPLE v TOD KEVIN HOUTHOOFD, No. 157740; Court of Appeals No. 332323.

VINSON-DOPP v LYONS, No. 157828; Court of Appeals No. 335283.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

TRJ & E PROPERTIES, LLC v CITY OF LANSING, No. 157847; reported below: 323 Mich App 664.

SCOTT v CITY OF SOUTH HAVEN, No. 157867; Court of Appeals No. 339007.

PEOPLE v JEREMY JAMISON, PEOPLE v CLIFFORD JOHNSON, and PEOPLE v LORENZO JAMISON, Nos. 157988, 157989, and 157990; Court of Appeals Nos. 336124, 336143, and 336154.

PEOPLE v THORNTON, No. 158276; Court of Appeals No. 342879.

Statement Regarding Decision on Motion for Disqualification Entered January 16, 2019:

KENDZIERSKI v MACOMB COUNTY, No. 156086; reported below: 319 Mich App 278.

VIVIANO, J. I deny plaintiffs' motion for disqualification.[1] As an initial matter, recusal is a consequential action, and courts have recognized a judge's duty to hear cases in which recusal standards are not met. See, e.g., *In re Drexel Burnham Lambert, Inc*, 861 F2d 1307, 1312 (CA 2, 1988) ("A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is."); *Anderson v United States*, 754 A2d 920, 925 (DC, 2000) ("Although a judge has a duty to recuse when required, a judge has as strong an obligation not to recuse when the situation does not require.") (quotation marks and citation omitted). Justices of this Court have also recognized a "duty to sit" that constrains members of a court of last resort in particular. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 949, 951 n 3 (2008) (statement by YOUNG and MARKMAN, JJ.) (discussing the "the 'Duty to Sit' doctrine, under which there is an obligation to remain on any case absent good grounds for recusal, especially in a court of last resort, such as the supreme court of a jurisdiction, where there are no substitute judges to take the place of those who are recused") (quotation marks and citation omitted).

I requested that the Supreme Court Clerk, Larry Royster, send a letter to counsel on the subject of disqualification because I did not know whether the parties were aware that my father is a retiree of Macomb County and that my father and mother receive healthcare benefits from the county that may be impacted by the Court's decision in this case.[2]

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[1] See MCR 2.003(D)(3)(b) ("In the Supreme Court, if a justice's participation in a case is challenged by a written motion . . . the challenged justice shall decide the issue and publish his or her reasons about whether to participate.").

[2] Judges have an ethical responsibility to "raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(C)." Code of Judicial Conduct, Canon 3(C).

However, plaintiffs concede that they have known since early 2011 that my father was a retiree of Macomb County and that by early 2013 (when they took the deposition of Wendy Fisher), plaintiffs further were made aware that changes to the healthcare benefits of the county's union and nonunion retirees had moved in lockstep. A motion for disqualification in the Supreme Court must be filed "within 28 days after the filing of the application for leave to appeal or within 28 days of the discovery of the grounds for disqualification." MCR 2.003(D)(1)(c). Plaintiffs' motion is not based on newly discovered grounds and was not filed within 28 days after the filing of the application for leave to appeal. It is therefore untimely.[3] Despite the fact that defendant raised the timeliness issue in its response, plaintiffs have failed to show good cause for their untimeliness.[4] Therefore, I deny as untimely plaintiffs' motion for disqualification on this ground.

After arguing that my family interests warrant recusal (presumably on the basis that I may be partial to plaintiffs), plaintiffs argue somewhat inconsistently that I should also be disqualified because of my relationship with the Macomb County Executive (presumably on the basis that I may be partial to defendant). In particular, plaintiffs express concern that I recently attended the County Executive's official and public swearing-in ceremony and his annual State of the County Address. However, plaintiffs provide no authority for the proposition that judges should not attend public ceremonies involving the other branches of government. It is not uncommon for the members of this Court, or the United States Supreme Court for that matter, to attend or conduct the swearing-in ceremonies for members of the other branches

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[3] Contrary to the implication in plaintiffs' reply brief, the statement in Mr. Royster's letter that the parties must file a motion for disqualification "within 28 days of the date of this letter" did not suspend the timing requirements of the rule. Rather, the letter stated only that the rule provides a 28-day period for motions for disqualification if the grounds are newly discovered. See MCR 2.003(D)(1)(c) ("All other motions must be filed within 28 days after the filing of the application for leave to appeal *or within 28 days of the discovery of the grounds for disqualification*.") (emphasis added). Here they were not.

[4] After stating that a motion for disqualification "must" be filed within the time periods set forth in the rule, MCR 2.003(D)(1)(c), and that untimely motions "may be granted for good cause shown," MCR 2.003(D)(1)(d), the rule confusingly states that "untimeliness is a factor in deciding whether the motion should be granted," MCR 2.003(D)(1)(d). It is unclear, therefore, how much discretion a judge has to grant an untimely motion to disqualify. See generally *Davis v Chatman*, 292 Mich App 603, 615 (2011) (holding that the failure to comply with the procedural requirements of MCR 2.003 "waived the issue of disqualification"). Regardless, it is undisputed that the motion was untimely, and plaintiffs have not provided any good cause for their delay or other countervailing factors militating in favor of granting the motion.

of government.[5] Nor is it uncommon for justices to attend the State of the Union or the State of the State address.[6] Crediting plaintiffs' theory would mean that United States Supreme Court justices could not hear cases involving the United States as a party, and no member of this Court could hear cases in which the state of Michigan was a party. There is no support in logic, law, or history for such a conclusion.[7] I deny the motion on this basis as well.

Leave to Appeal Denied January 18, 2019:

In re AR SANDERS, MINOR, No. 158734; Court of Appeals No. 342578.

PEOPLE v TONNIE JOHNSON, No. 158908; Court of Appeals No. 340782.

Summary Disposition January 23, 2019:

PEOPLE v JENELL BAILEY, No. 157836; Court of Appeals No. 339122. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to

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[5] On January 1, 2019, all members of this Court attended the swearing-in of the governor, attorney general, secretary of state, supreme court justices, court of appeals judges, and newly elected members of the statewide education boards. See Detroit Free Press, *Gretchen Whitmer Officially Sworn in as Michigan's 49th Governor* (accessed January 14, 2019) [https://perma.cc/WD9X-MY88]. And, every four years, the Chief Justice of the United States Supreme Court administers the oath of office to the President of the United States. See The New York Times, *The Oath of Office: 35 Words That Are Harder Than They Look* (accessed January 15, 2019) [https://perma.cc/X4E7-8Q3N].

[6] All members of this Court typically are in attendance for the State of the State address. See WKAR, *Michigan State of State* (accessed January 14, 2019) [https://perma.cc/DDH4-N6LA]. Fewer United States Supreme Court justices have attended the State of the Union in recent years. See New York Post, *Only Four Supreme Court Justices Attend State of the Union* (accessed January 14, 2019) [https://perma.cc/8P99-4NGW].

[7] Plaintiffs argue more broadly that the motion should be granted because I am acquainted with their "litigation-nemesis" and " 'star witness.' " But—even assuming a cordial relationship exists—plaintiffs again provide no support for the notion that such a relationship with a party or witness requires recusal. Cf. MCR 2.003(C)(1)(g)(iv) ("Disqualification of a judge is warranted for reasons that include . . . [t]he judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . is to the judge's knowledge likely to be a material witness in the proceeding.").

appeal, we vacate that part of the Court of Appeals judgment that reversed the Macomb Circuit Court's June 28, 2017 order granting the defendant's motion to withdraw her guilty plea. Although the Court of Appeals correctly concluded that the trial court failed to state a legitimate basis for permitting plea withdrawal, it erred in remanding the case for sentencing rather than for redetermination of the defendant's motion. The defendant claimed that her attorney told her that, if she changed her mind before sentencing, she could withdraw her plea. If true, that would call into question whether the plea was entered knowingly and voluntarily. We remand this case to the Macomb Circuit Court for an evidentiary hearing to determine whether the defendant's attorney advised her that she would be able to withdraw her guilty plea on her own volition before sentencing, and if so, whether she should be permitted to withdraw her plea. We do not retain jurisdiction.

PEOPLE v RAMSEY, No. 158154; Court of Appeals No. 334614. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment reversing the Saginaw Circuit Court's March 3, 2016 decision to grant a new trial on grounds that the verdict was against the great weight of the evidence, and we remand this case to the Court of Appeals for consideration as on reconsideration granted. The Court of Appeals held that the trial court had abused its discretion in granting a new trial "for the same reasons" as it erred in deciding that the evidence was insufficient to convict the defendant of conspiracy, and found that "the record evidence did not preponderate against the jury's verdict to the extent that a miscarriage of justice has occurred." Though there may be sufficient evidence to convict when the evidence is viewed in the light most favorable to the prosecutor, that does not render a decision on the great weight of the evidence an abuse of discretion. See *People v Lemmon*, 456 Mich 625, 633-635 (1998). On remand, the Court of Appeals shall determine whether the decision to grant a new trial was within the range of principled outcomes in light of the trial court's finding that the jury verdict resulted in a miscarriage of justice. MCR 6.431(B). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

In re PAROLE OF ROBERT ERWIN STUMPMIER, No. 158203; Court of Appeals No. 343502. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

BURNETT v AHOLA, Nos. 158531 and 158538; Court of Appeals No. 338618. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the June 13, 2018 opinion and order of the Genesee Circuit Court, and remand this case to the trial court for further consideration.

Although the plaintiff has asserted the defenses of waiver and estoppel, neither defense applies in this case. "A true waiver is an intentional, voluntary act and cannot arise by implication. It has been defined as the voluntary relinquishment of a known right." *Landelius v Sackellares*, 453 Mich 470, 480 (1996), quoting *Kelly v Allegan Circuit Judge*, 382 Mich 425, 427 (1969). There is no dispute that neither

defendant knowingly and voluntarily relinquished their respective right to assert intrinsic fraud or fraud on the court. And because the defendants' motion for relief from judgment constitutes a timely challenge to the validity of the paternity judgment in the same civil action under the Revocation of Paternity Act (ROPA), MCL 722.1431 *et seq*., collateral estoppel does not apply. See *Jones v Chambers*, 353 Mich 674, 680-681 (1958).

Accordingly, on remand, the Genesee Circuit Court shall: (1) conduct an in-person evidentiary hearing to determine whether the plaintiff committed intrinsic fraud or fraud on the court during the ROPA proceedings, which shall include consideration of relevant evidence discovered after entry of the ROPA judgment; and (2) if so, determine to what, if any, remedy the defendants are entitled. The Genesee Circuit Court is directed to expedite its consideration and resolution of this case. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered January 23, 2019:

PEOPLE v FURLINE and PEOPLE v ALVIN JENKINS, Nos. 158296 and 158298; Court of Appeals Nos. 335906 and 336203. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals clearly erred in its application of the principles of *People v Hana*, 447 Mich 325 (1994), to the defendants' motions for separate trials. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file supplemental briefs within 21 days of being served with the appellant's brief. The appellees shall also electronically file appendices, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the respective appellee's brief. The parties should not submit mere restatements of their application papers.

The total time allowed for oral argument shall be 40 minutes: 20 minutes for the appellant, and 20 minutes for the appellees, to be divided at their discretion. MCR 7.314(B)(2).

The application for leave to appeal as cross-appellant remains pending.

DERUITER v TOWNSHIP OF BYRON, No. 158311; reported below: 325 Mich App 275. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the defendant's zoning ordinance pertaining to the location of registered medical marijuana caregivers is preempted by the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The

appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Michigan Townships Association, the Michigan Municipal League, and the Government Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied January 23, 2019:

PEOPLE v ERNEST GRAHAM, No. 157823; Court of Appeals No. 335609.

PEOPLE v SPITLER, No. 158249; Court of Appeals No. 331962.

FRIEDMAN v INSURANCE SERVICES CONSTRUCTION CORPORATION, No. 158409; Court of Appeals No. 344134.

Summary Disposition January 25, 2019:

PEOPLE v BIESZKA, No. 157654; Court of Appeals No. 339954. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the February 28, 2017 opinion and order of the Allegan Circuit Court, and we remand this case to that court for reconsideration of the defendant's petition for exemption from the requirements of the Sex Offenders Registration Act, MCL 28.721 *et seq*. See MCL 28.722(w)(*iv*); MCL 28.723a. On remand, the trial court shall consider all of the information that was presented at the hearing on the defendant's petition, including the text messages from the complainant, and issue a written decision excusing or requiring the defendant to register, which either the defendant or the prosecutor may appeal as of right. MCL 28.723a(6). We do not retain jurisdiction.

Petition for Interim Suspension Denied January 25, 2019:

IN THE MATTER OF THERESA M BRENNAN, JUDGE 53RD DISTRICT COURT BEFORE THE JUDICIAL TENURE COMMISSION, No. 157930. On order of the Court, the motion for immediate consideration is granted. The petition for interim suspension is considered, and it is denied without prejudice to the filing of a petition for interim suspension by the Judicial Tenure Commission. Section 30(2) of Article 6 of the 1963 Constitution provides that the Court may take certain disciplinary actions against a judge only "[o]n recommendation of the judicial tenure commission . . . ." In *In re Hathaway*, 464 Mich 672, 683 (2001), we noted that when the "*commission* comes to this Court with a recommendation for discipline, it invokes the Court's jurisdiction under Const 1963, art 6, § 30(2) . . . ." (Emphasis added.) It is the invocation of this Court's jurisdiction by the

commission that gives the Court authority to act. *Id*. Further, MCR 9.219(A)(1) provides only that "the commission may petition the Supreme Court" for an order suspending a judge until final adjudication of the complaint.

The petition before the Court was not filed on behalf of the commission. Rather, the petition was filed by the Judicial Tenure Commission "Deputy Executive Director, with the permission of the Commission . . . ." Indeed, the commission's January 9, 2019 order "expresse[d] no opinion regarding . . . the substance and/or merits of the Examiner's motion for interim suspension . . . ." Accordingly, there is no recommendation or petition from the commission before the Court.

Order Denying Motion to Disqualify February 1, 2019:

KENDZIERSKI v MACOMB COUNTY, No. 156086; reported below: 319 Mich App 278. Upon de novo review by the entire Court in accordance with MCR 2.003(D)(2)(b), the Court orders that the motion of plaintiffs-appellees to disqualify Justice DAVID F. VIVIANO from participating in the decision of this case is denied for the reason that no justice is persuaded that there is any ground for the disqualification of Justice VIVIANO.

VIVIANO, J., did not participate in the decision because he is the subject of the disqualification motion.

CAVANAGH, J., is not participating in the case, including the motion to disqualify, because the case was argued before she assumed office.

Summary Disposition February 4, 2019:

PEOPLE v AKRAM, No. 155973; Court of Appeals No. 336328. On order of the Court, the application for leave to appeal the April 18, 2017 order of the Court of Appeals is considered. We observe that this appeal arises from a filing mix-up. As the defendant correctly notes, his motion reporting a fraud upon the court was originally filed in this Court and resolved by a denial order entered February 3, 2016. Docket No. 151817. The trial court record reveals that the defendant mailed a copy of that motion, designated as a Supreme Court motion, to the Wayne Circuit Court. Unfortunately, the circuit court did not recognize the designation, mistakenly treated it as a new motion for relief from judgment under MCR subchapter 6.500, and ultimately denied relief. Because it appears to this Court that the defendant did not intend to file the motion in the circuit court, we vacate all rulings arising from that misfiling, including the Wayne Circuit Court order entered June 20, 2016, and the Court of Appeals denial order entered April 18, 2017. The Court further notes that the defendant remains entitled to file one motion for relief from judgment under MCR subchapter 6.500, but he is barred from relitigating those claims already resolved by this Court's February 3, 2016 order. See MCR 6.502(D)(2). The motion for miscellaneous relief is denied.

WHITE v EDS CARE MANAGEMENT LLC, No. 158078; Court of Appeals No. 342657. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to

appeal, we remand this case to the Michigan Compensation Appellate Commission for further clarification of the details of the sanctions that it has imposed on the plaintiff. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v FILCEK, No. 158317; Court of Appeals No. 343897. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the July 10, 2018 order of the Court of Appeals and remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Eric J. Anderson* (Docket No. 343272). After *Anderson* is decided, the Court of Appeals shall reconsider the defendant's delayed application for leave to appeal.

Leave to Appeal Denied February 4, 2019:

PEOPLE v DELL, No. 155005; Court of Appeals No. 334486.

PEOPLE v DAJUAN LOVE, No. 156351; Court of Appeals No. 337027.

PEOPLE v DENZEL SIMMONS, No. 156403; Court of Appeals No. 337087.

PEOPLE v KEVIN SYKES, No. 156583; Court of Appeals No. 338845.

PEOPLE v ONUMONU, No. 156834; Court of Appeals No. 329100.

PEOPLE v GALLMORE, No. 157115; Court of Appeals No. 340106.

PEOPLE v JAMES HOLLAND, No. 157259; Court of Appeals No. 341124.

PEOPLE v RICE, No. 157297; Court of Appeals No. 340727.

PEOPLE v DUNLAP, No. 157570; Court of Appeals No. 340776.

PEOPLE v WITBRODT, No. 157689; Court of Appeals No. 341671.

PEOPLE v DRIVER, No. 157703; Court of Appeals No. 342561.

PEOPLE v TEAUNTE HARPER, No. 157765; Court of Appeals No. 335933.

PEOPLE v TOD HOUTHOOFD, No. 157773; Court of Appeals No. 339459.

PEOPLE v MOODY, No. 157811; Court of Appeals No. 342271.

PEOPLE v JAYJUIAN WATTS, No. 157827; Court of Appeals No. 340840.

PEOPLE v BROADNAX, No. 157864; Court of Appeals No. 333205.

PEOPLE v DIZDAREVIC, No. 157888; Court of Appeals No. 342939.

PEOPLE v MICAH EVANS, No. 157962; Court of Appeals No. 335327.

PEOPLE v SHAVER, No. 157963; Court of Appeals No. 341317.

MELNYCHENKO v CARRINGTON MORTGAGE SERVICES, LLC, No. 157979; Court of Appeals No. 337118.

In re MANWELL, No. 157985; Court of Appeals No. 341965.

PEOPLE v JONNIE JOHNSON, No. 157994; Court of Appeals No. 340950.

PEOPLE v SESSOMS, No. 158014; Court of Appeals No. 341517.

PEOPLE v BLACKAMORE, No. 158022; Court of Appeals No. 343100.

PEOPLE v ANDREW HACKNEY, No. 158030; Court of Appeals No. 342760.

THESIER v TBSK LIMITED PARTNERSHIP, No. 158043; Court of Appeals No. 336398.

PEOPLE v DONALD JONES, No. 158045; Court of Appeals No. 341897.

PEOPLE v DONKERS, No. 158089; Court of Appeals No. 343455.

PEOPLE v HENTON, No. 158096; Court of Appeals No. 343501.

PEOPLE v FREDERICK CORDS, No. 158104; Court of Appeals No. 335865.

PEOPLE v MARTINEZ, No. 158108; Court of Appeals No. 343475.

PEOPLE v COREY ROBINSON, No. 158114; Court of Appeals No. 342265.

PEOPLE v OSBORNE, No. 158127; Court of Appeals No. 336716.

PEOPLE v LANG, No. 158135; Court of Appeals No. 343426.

PEOPLE v TIMOTHY THOMPSON, No. 158139; Court of Appeals No. 342524.

PEOPLE v ORLANDO MITCHELL, No. 158140; Court of Appeals No. 341206.

PEOPLE v BUTLER, No. 158142; Court of Appeals No. 342063.

PEOPLE v SWITZER, No. 158157; Court of Appeals No. 341237.

PEOPLE v FAVORS, No. 158165; Court of Appeals No. 343824.

PEOPLE v JERMAINE COOPER, No. 158167; Court of Appeals No. 336662.

BUTTS v ST JOHN MACOMB-OAKLAND HOSPITAL, No. 158172; Court of Appeals No. 334892.

CLINE v ALLSTATE INSURANCE COMPANY, No. 158179; Court of Appeals No. 336299.

PEOPLE v THOMAS HILL, No. 158180; Court of Appeals No. 342368.

PEOPLE v JACKWAY, No. 158182; Court of Appeals No. 344105.

PEOPLE v NICHOLAS SCOTT, No. 158184; Court of Appeals No. 342208.
MCCORMACK, C.J., did not participate because she may have independent knowledge regarding this case.

PEOPLE v KEYA JONES, No. 158191; Court of Appeals No. 336123.

MCCANN v GUERECA-BATANI, No. 158202; Court of Appeals No. 343743.

PEOPLE v WICKS, No. 158212; Court of Appeals No. 337937.

PEOPLE v MICHAEL WATTS, No. 158226; Court of Appeals No. 338204.

PEOPLE v XAVIER SMITH, No. 158227; Court of Appeals No. 342796.

PEOPLE v MICHAEL MAY, No. 158243; Court of Appeals No. 343776.

PEOPLE v JAMARQUIS ROBINSON, No. 158248; Court of Appeals No. 333586.

PEOPLE v TRAVIOLI, No. 158250; Court of Appeals No. 343694.

PEOPLE v HENNING, No. 158252; Court of Appeals No. 337881.

PEOPLE v DELMEREY MORRIS, No. 158264; Court of Appeals No. 337317.

BAZZI v KATBEY, No. 158273; Court of Appeals No. 342804.

PEOPLE v PRINCE, No. 158277; Court of Appeals No. 340544.

PEOPLE v MCCLINTON, No. 158281; Court of Appeals No. 343938.

PEOPLE v JAWONE WATKINS, No. 158282; Court of Appeals No. 337453.

PEOPLE v STEVEN WILLIAMS, No. 158284; Court of Appeals No. 341854.

PEOPLE v GILLIAM, No. 158290; Court of Appeals No. 335533.

PEOPLE v MILT, No. 158294; Court of Appeals No. 342416.

PEOPLE v ALEXANDER, No. 158295; Court of Appeals No. 342398.

GRIEVANCE ADMINISTRATOR v SHIRVELL, No. 158309.
CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

PEOPLE v HENRY DAVIS, No. 158310; Court of Appeals No. 343200.

PEOPLE v BLANTON, No. 158316; Court of Appeals No. 342152.

PEOPLE v SHAWN BELL, No. 158318; Court of Appeals No. 341051.

PEOPLE v RAIHALA, No. 158327; Court of Appeals No. 342427.

PEOPLE v MICHAEL DAVIS, No. 158329; Court of Appeals No. 337221.

PEOPLE v CZARNIK, No. 158331; Court of Appeals No. 338856.

PEOPLE v ANTHONY FRANK JONES, No. 158343; Court of Appeals No. 343937.

PEOPLE v GILES, No. 158346; Court of Appeals No. 343787.

PEOPLE v WESTLY GEORGE, No. 158347; Court of Appeals No. 335641.

PEOPLE v STEIN, No. 158348; Court of Appeals No. 341848.

PEOPLE v CLOUTIER, No. 158351; Court of Appeals No. 342727.

PEOPLE v JEFFREY JONES, No. 158352; Court of Appeals No. 344331.

PEOPLE v NICHOLAS ROSS, No. 158357; Court of Appeals No. 336263.

PEOPLE v TRACY DANIELS, No. 158364; Court of Appeals No. 344044.

PEOPLE v SALTER, No. 158368; Court of Appeals No. 343742.

PEOPLE v CAUSEY, No. 158380; Court of Appeals No. 343584.

PEOPLE v FOX, No. 158381; Court of Appeals No. 343907.

PEOPLE v PAYEUR, No. 158385; Court of Appeals No. 337325.

PEOPLE v KENNETH THOMPSON, No. 158387; Court of Appeals No. 339890.

PEOPLE v WILLIAM DEWEY, No. 158388; Court of Appeals No. 343799.

GIAMMARCO v DIVERSE FACILITY SOLUTIONS, INC, No. 158389; Court of Appeals No. 338025.

PEOPLE v AUSTIN BANKS, No. 158390; Court of Appeals No. 344271.

DEWARD v CITY OF FARMINGTON HILLS, No. 158397; Court of Appeals No. 337608.

PEOPLE v KEITH LEWIS, No. 158399; Court of Appeals No. 337843.

PEOPLE v ZINTMAN, No. 158400; Court of Appeals No. 334574.

PEOPLE v BILAL, No. 158404; Court of Appeals No. 342847.

PEOPLE v TRENT GARDNER, No. 158405; Court of Appeals No. 343935.

PEOPLE v RUIMVELD, No. 158406; Court of Appeals No. 344040.

PEOPLE v RUIMVELD, No. 158407; Court of Appeals No. 344043.

PEOPLE v TERRANCE BAILEY, No. 158415; Court of Appeals No. 342759.

PEOPLE v MOTT, No. 158419; Court of Appeals No. 338923.

SCHMITT v GENESYS REGIONAL MEDICAL CENTER, No. 158421; Court of Appeals No. 337619.

PEOPLE v DEANGELO THOMAS, No. 158427; Court of Appeals No. 336601.

PEOPLE v FLORES, No. 158428; Court of Appeals No. 344593.

PEOPLE v LONGORIA, No. 158429; Court of Appeals No. 344473.

PEOPLE v HARTSON, No. 158435; Court of Appeals No. 338584.

ANDY J EGAN CO, INC v PRO SERVICES, INC, No. 158436; Court of Appeals No. 336358.

PEOPLE v ERIC GALLOWAY, No. 158440; Court of Appeals No. 329480.

PEOPLE v JOSHUA WILLIAMS, No. 158441; Court of Appeals No. 342210.

PEOPLE v SPARKS, No. 158443; Court of Appeals No. 337148.

PEOPLE v BRANDON MCBRIDE, No. 158446; Court of Appeals No. 343626.

PEOPLE v MARQUEZ, No. 158447; Court of Appeals No. 339856.

PEOPLE v TRINITY DAVIS, No. 158448; Court of Appeals No. 343183.

PEOPLE v DYMARID CARTER, No. 158451; Court of Appeals No. 336793.

PEOPLE v DEVER, No. 158463; Court of Appeals No. 344327.

PEOPLE v JASON GATES, No. 158464; Court of Appeals No. 338437.

STAFFNEY v MICHIGAN REFORMATORY WARDEN, No. 158473; Court of Appeals No. 343796.

VORUS v DEPARTMENT OF CORRECTIONS, No. 158475; Court of Appeals No. 338474.

PEOPLE v SHUTTER, No. 158485; Court of Appeals No. 336613.

TRADER v COMERICA BANK, No. 158487; Court of Appeals No. 339577.

In re SUMPTER, No. 158488; Court of Appeals No. 342853.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v CRAFT, No. 158490; reported below: 325 Mich App 598.

PEOPLE v DEBORAH CALDWELL, No. 158495; Court of Appeals No. 344413.

PEOPLE v PAYNE, No. 158500; Court of Appeals No. 344964.

PEOPLE v MARTEZ MASON, No. 158501; Court of Appeals No. 336839.

PEOPLE v ABUSALAH, No. 158504; Court of Appeals No. 343214.

PEOPLE v TITUS, No. 158510; Court of Appeals No. 345087.

PEOPLE v MCCARTER, No. 158535; Court of Appeals No. 344728.

PEOPLE v RUFUS THOMAS, No. 158536; Court of Appeals No. 337760.

PEOPLE v EDMONDS, No. 158539; Court of Appeals No. 339471.

PEOPLE v LAKISHA SPENCER, No. 158553; Court of Appeals No. 343955.

PEOPLE v STEVEN ADAMS, No. 158554; Court of Appeals No. 344810.

PEOPLE v FLENOID GREER, No. 158576; Court of Appeals No. 343219.

ELDERSVELD v ELDERSVELD, No. 158582; Court of Appeals No. 344789.

HOUTHOOFD v LAW OFFICE OF MATTHEW REYES, No. 158611; Court of Appeals No. 340514.

PEOPLE v KEVIN PRICE, No. 158614; Court of Appeals No. 344749.

In re LOUIS G BASSO, JR, REVOCABLE LIVING TRUST, No. 158629; Court of Appeals No. 337321.

PEOPLE v JOHNNIE GARY, No. 158651; Court of Appeals No. 344692.

ROYCE v LAPORTE, Nos. 158726, 158727, and 158728; Court of Appeals Nos. 337549, 340354, and 339903.

Superintending Control Denied February 4, 2019:

MANSHARAMANI v ATTORNEY GRIEVANCE COMMISSION, No. 157582.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

HOOGTERP v ATTORNEY GRIEVANCE COMMISSION, No. 158626.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

MICHAEL WILLIAMS v ATTORNEY GRIEVANCE COMMISSION, No. 158631.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

MORCIGLIO v ATTORNEY GRIEVANCE COMMISSION, No. 158642.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied February 4, 2019:

PEOPLE v WORTHINGTON, No. 153209; Court of Appeals No. 330148. Summary disposition order entered at 503 Mich 863.

PEOPLE v JASON ROSE, No. 156322; Court of Appeals No. 337561. Leave to appeal denied at 503 Mich 872.

In re GUARDIANSHIP OF DOROTHY REDD, No. 156705; reported below: 321 Mich App 398. Leave to appeal denied at 503 Mich 878.

PEOPLE v POWELL, No. 156987; Court of Appeals No. 338479. Leave to appeal denied at 503 Mich 873.

PEOPLE v COLEMAN, No. 157071; Court of Appeals No. 338862. Leave to appeal denied at 503 Mich 885.

PEOPLE v STRANDBERG, No. 157093; Court of Appeals No. 340769. Leave to appeal denied at 503 Mich 873.

PEOPLE v PALMER, No. 157155; Court of Appeals No. 339327. Leave to appeal denied at 503 Mich 885.

RAINBOW CONSTRUCTION, INC v TOWNSHIP OF HOWELL, Nos. 157206, 157207, 157208, and 157209; Court of Appeals Nos. 332621, 333336, 335140, and 335142. Leave to appeal denied at 502 Mich 903.

NAILS v PROASSURANCE INDEMNITY COMPANY, INC, No. 157278; Court of Appeals No. 339050. Leave to appeal denied at 503 Mich 858.

PEOPLE v KEVIN JOHNSON, No. 157406; Court of Appeals No. 340229. Leave to appeal denied at 503 Mich 873.

PEOPLE v JAHAN GREEN, No. 157429; Court of Appeals No. 332835. Leave to appeal denied at 503 Mich 868.

WIEGAND v YAMASAKI, No. 157430; Court of Appeals No. 334598. Leave to appeal denied at 503 Mich 871.

PEOPLE v RUMPF, No. 157448; Court of Appeals No. 333544. Leave to appeal denied at 503 Mich 873.

MACOMB COUNTY v GREINER, No. 157489; Court of Appeals No. 334264. Leave to appeal denied at 503 Mich 886.

PEOPLE v FARROW, No. 157490; Court of Appeals No. 339361. Leave to appeal denied at 503 Mich 874.

FOSTER v GANGES TOWNSHIP, Nos. 157504 and 157505; Court of Appeals Nos. 336937 and 337278. Leave to appeal denied at 503 Mich 886.

WIDNER v TRAVELERS INSURANCE COMPANY, No. 157534; Court of Appeals No. 339977. Leave to appeal denied at 503 Mich 860.

PEOPLE v ALBARATI, No. 157549; Court of Appeals No. 334169. Leave to appeal denied at 503 Mich 860.

CAN IV PACKARD SQUARE LLC v PACKARD SQUARE LLC, No. 157575; Court of Appeals No. 335512. Leave to appeal denied at 503 Mich 860.

PEOPLE OF MERIDIAN TOWNSHIP v BANAS, No. 157576; Court of Appeals No. 338298. Leave to appeal denied at 503 Mich 861.

PEOPLE v BYRNES, Nos. 157726 and 157727; Court of Appeals Nos. 341377 and 341380. Leave to appeal denied at 503 Mich 861.

HALE v DEPARTMENT OF CORRECTIONS, No. 157751; Court of Appeals No. 339831. Leave to appeal denied at 503 Mich 874.

PEOPLE v BARRERA, No. 157784; Court of Appeals No. 342493. Leave to appeal denied at 503 Mich 875.

PEOPLE v MCAFEE, No. 157819; Court of Appeals No. 341612. Leave to appeal denied at 503 Mich 861.

PEOPLE v MARSHALL, No. 157833; Court of Appeals No. 341783. Leave to appeal denied at 503 Mich 887.

PEOPLE v DOUGLAS JACKSON, No. 157835; Court of Appeals No. 342075. Summary disposition order entered at 503 Mich 872.

PEOPLE v KELEL, No. 157866; Court of Appeals No. 336268. Leave to appeal denied at 503 Mich 888.

Leave to Appeal Denied February 13, 2019:

LUCERNE INTERNATIONAL, INC v DURA AUTOMOTIVE SYSTEMS, LLC, No. 159005; Court of Appeals No. 346996.

JONES v DTE ENERGY CORPORATE SERVICES, LLC, No. 159023; Court of Appeals No. 345117.

SAMMUT v BATRA, No. 159037; Court of Appeals No. 345254.

PEOPLE v LAMPE, No. 159077; Court of Appeals No. 342325.

PEOPLE v MINTER, No. 159103; Court of Appeals No. 347523.

Leave to Appeal Denied February 15, 2019:

In re SMITH, MINORS No. 158916; Court of Appeals No. 343940.

In re MERRIMAN, MINORS, No. 158973; Court of Appeals No. 344114.

In re POTTER/LONG, MINORS, No. 158974; Court of Appeals No. 342731.

Petition for Interim Suspension Granted February 27, 2019:

IN THE MATTER OF THERESA M BRENNEN, JUDGE 53RD DISTRICT COURT BEFORE THE JUDICIAL TENURE COMMISSION, No. 157930. On order of the Court, the motion for immediate consideration is granted. The petition for interim suspension is considered, and it is granted. The Honorable Theresa M. Brennan, Judge of the 53rd District Court, is suspended with pay until further order of this Court.

Summary Disposition March 5, 2019:

PEOPLE v THOMPKINS, No. 156724; Court of Appeals No. 339876. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for further proceedings consistent with this order. On remand, appointed counsel may file, within six months of the date of this order, any necessary or appropriate postconviction motions in the trial court as to the defendant's December 13, 2016 plea-based conviction. If a postconviction motion is filed in the trial court, counsel may file an application for leave to appeal to the Court of Appeals within six months of the order disposing of that motion. The defendant was effectively deprived, through no fault of his own, of the opportunity to have appointed appellate counsel file a timely motion to withdraw the plea. The Court of Appeals erred when it concluded that the defendant had failed to demonstrate that the issue should be decided initially by the trial court. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should now be reviewed by this Court. We do not retain jurisdiction.

2 CROOKED CREEK, LLC v FRYE, No. 158101; Court of Appeals No. 341274. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v SMALLWOOD, No. 158262; Court of Appeals No. 343789. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v JOSEPH COOPER, No. 158679; Court of Appeals No. 345108. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall consider whether a defendant's unpreserved claim regarding his or her lack of physical presence at sentencing is subject to review for plain error. See *People v Heller*, 316 Mich App 314 (2016). We direct the Court of Appeals' attention to the fact that it currently has before it the case of *People v Enciso*, Docket No. 157906, a case we remanded as on leave granted on December 19, 2018. In all other respects, leave to appeal is denied.

PEOPLE v NICHOLS, No. 158707; Court of Appeals No. 333395. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the March 29, 2016 order of the Wayne Circuit Court denying the defendant's motion for relief from judgment, and we remand this case to the circuit court for reconsideration of the motion. The circuit court erroneously found that the defendant's issues were raised during his appeal as of right and thus were barred. The court mistakenly identified the issues raised in the defendant's appeal in a different, unrelated case, Wayne CC No. 12-008776-FH. We do not retain jurisdiction.

PEOPLE v GRANT, No. 158745; Court of Appeals No. 344625. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied March 5, 2019:

PEOPLE v JOHN CARTER, No. 156509; Court of Appeals No. 331332.

PEOPLE v JOSEPH, No. 157443; Court of Appeals No. 340936.

PEOPLE v BETHEA, No. 157564; Court of Appeals No. 334004.

PEOPLE v DEWITT, No. 157804; Court of Appeals No. 342399.

PEOPLE v RODERICK PERSON, No. 157818; Court of Appeals No. 340611.

PEOPLE v ABSOLEM THOMAS, No. 157829; Court of Appeals No. 340555.

PEOPLE v MOSHER, No. 157834; Court of Appeals No. 340881.

PEOPLE v BRIAN PATRICK, No. 157883; Court of Appeals No. 332128.

SUMMER v SOUTHFIELD BOARD OF EDUCATION, No. 157933; reported below: 324 Mich App 81.

PEOPLE v GREGORY, No. 157967; Court of Appeals No. 337320.

PEOPLE v EARL SMITH, No. 158008; Court of Appeals No. 337363.

JONES v WESTMINSTER, LLC, No. 158037; Court of Appeals No. 334447.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v WITHERS, Nos. 158057 and 158058; Court of Appeals Nos. 335253 and 336897.

PEOPLE v DENNIS MILLER, No. 158074; Court of Appeals No. 337930.

PEOPLE v GUILE, No. 158083, Court of Appeals No. 341529.

PEOPLE v FATEEN MUHAMMAD, No. 158116; Court of Appeals No. 339157.

PEOPLE v SHELTON CARTER, No. 158149; Court of Appeals No. 342126.

PEOPLE v RODNEY PERSON, No. 158185; Court of Appeals No. 335534.

STRATEGY AND EXECUTION, INC v LXR BIOTECH, LLC, No. 158214; Court of Appeals No. 337105.

PEOPLE v DALE MORRIS, No. 158247; Court of Appeals No. 333468.

PEOPLE v KASBEN, No. 158261; reported below: 324 Mich App 1.

PEOPLE v LINES, No. 158278; Court of Appeals No. 336453.

PEOPLE v GOLDMAN, No. 158319; Court of Appeals No. 342072.

PEOPLE v KRANZ, No. 158320; Court of Appeals No. 335416.

BASSETT v COUNTY OF WAYNE, Nos. 158336 and 158337; Court of Appeals Nos. 337065 and 338761.

RAYFIELD v STATE OF MICHIGAN, No. 158339; Court of Appeals No. 340886.

THREATT v BELLAMY CREEK CORRECTIONAL FACILITY WARDEN, No. 158342; Court of Appeals No. 342685.

PEOPLE v SHONI, No. 158376; Court of Appeals No. 338964.

PEOPLE v ERVIN, No. 158433; Court of Appeals No. 343665.

PEOPLE v TOPPINGS, No. 158453; Court of Appeals No. 344357.

PEOPLE v SAUL, No. 158456; Court of Appeals No. 335426.

PEOPLE v BRENITAZE MOORE, No. 158465; Court of Appeals No. 344748.

PEOPLE v MALDONADO, No. 158467; Court of Appeals No. 343218. On order of the Court, the motion for immediate consideration is granted. The application for leave to appeal the August 9, 2018 order of the Court of Appeals is considered, and it is denied. The defendant remains entitled to file a motion for relief from judgment under MCR subchapter 6.500.

PEOPLE v KANE, No. 158468; Court of Appeals No. 341694.

In re ESTATE OF LOUIS HENRY BITTO III, Nos. 158477 and 158478; Court of Appeals Nos. 339083 and 339507.

PEOPLE v MEDAWAR, No. 158480; Court of Appeals No. 344766.

PEOPLE v TYWON HAMILTON, No. 158492; Court of Appeals No. 329845.

PEOPLE v FLEMING, No. 158507; Court of Appeals No. 341061.

In re CATHERINE ETHINGTON LIVING TRUST and *In re* CATHERINE ETHINGTON, Nos. 158513, 158514, 158515, 158516, and 158517; Court of Appeals Nos. 335904, 335905, 336370, 337643, and 337644.

PEOPLE v PIGGUE, No. 158520; Court of Appeals No. 344367.

PEOPLE v ALEX WATKINS, No. 158530; Court of Appeals No. 338211.

WHITE v DETROIT EAST COMMUNITY MENTAL HEALTH, No. 158532; Court of Appeals No. 342858.

PEOPLE v BLUMKE, No. 158543; Court of Appeals No. 338058.

PEOPLE v DARYL SMITH, No. 158556; Court of Appeals No. 338634.

PEOPLE v LESNESKIE, No. 158559; Court of Appeals No. 337657.

PEOPLE v FINKLEY, No. 158564; Court of Appeals No. 333897.

PEOPLE v CHARLES WILSON, Nos. 158594 and 158595; Court of Appeals Nos. 339774 and 342110.

PEOPLE v NICHOLS, No. 158596; Court of Appeals No. 339252.

PEOPLE v ALFRED NELSON, No. 158597; Court of Appeals No. 337759.

PEOPLE v JILES, No. 158601; Court of Appeals No. 337427.

PEOPLE v CORRINE BAKER, No. 158606; Court of Appeals No. 343321.

PEOPLE v NELSON, No. 158612; Court of Appeals No. 337268.

PEOPLE v PARROTT, No. 158637; Court of Appeals No. 345130.

PEOPLE v CHRISTINA WALKER, No. 158653; Court of Appeals No. 338887.

PEOPLE v KOOISTRA, No. 158678; Court of Appeals No. 338963.

PEOPLE v ROGELIO HAMILTON, Nos. 158684 and 158685; Court of Appeals Nos. 337638 and 337656.

PEOPLE v SCOTT CAMPBELL, No. 158686; Court of Appeals No. 336874.

PEOPLE v PHILLIPS-ADDIS, No. 158693; Court of Appeals No. 345083.

PEOPLE v WALTER JONES, No. 158696; Court of Appeals No. 338472.

PEOPLE v YEAGER, No. 158709; Court of Appeals No. 337787.

PEOPLE v REINHARD, No. 158710; Court of Appeals No. 345098.

PEOPLE V SCOTT CLARK, No. 158769; Court of Appeals No. 338868.

PEOPLE V JONATHAN THOMAS, No. 158859; Court of Appeals No. 345670.

PEOPLE V FREDERICK, No. 158870; Court of Appeals No. 341741.

PEOPLE V DOORNE, No. 158871; Court of Appeals No. 341742.

HEARLD V ROZEK, No. 158880; Court of Appeals No. 339530.

PEOPLE V BOBBY COLLINS, No. 158882; Court of Appeals No. 345991.

Summary Disposition March 8, 2019:

PEOPLE V SUEING, No. 155717; Court of Appeals No. 329961. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals that vacated the defendant's sentences for indecent exposure by a sexually delinquent person and we remand this case to that court, which shall hold this case in abeyance pending its decision in *People v Arnold (On Remand)* (Docket No. 325407). After *Arnold* is decided, the Court of Appeals shall reconsider this case in light of that decision. We further direct the Court of Appeals to consider the challenge to the assessment of points under Offense Variable 13, MCL 777.43, which was raised by the defendant but not addressed by that court during its initial review of this case. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

ANDERSON V SHIH, No. 159085; Court of Appeals No. 344540. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

ANDERSON V SHIH, No. 159087; Court of Appeals No. 344549. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Order of Public Censure Entered March 8, 2019:

In re HON JOSEPH S FILIP, JUDGE 12TH DISTRICT COURT JACKSON MICHIGAN BEFORE THE JUDICIAL TENURE COMMISSION, No. 158702. The Judicial Tenure Commission has issued a Decision and Recommendation, to which the respondent, Honorable Joseph S. Filip, 12th District Court Judge, consents. It is accompanied by a settlement agreement, in which the

respondent waived his rights, stipulated to findings of fact and conclusions of law, and consented to a sanction of public censure.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the following stipulated findings of fact of the Judicial Tenure Commission, which, following our de novo review, we adopt as our own:

> 1. Respondent presided over a preliminary examination in the case of *People v Rama Tyson*, case number 1705024FY, on July 14, 2017.
>
> 2. The prosecution was represented by Assistant Prosecuting Attorney (APA) Jeremiah Smith and the defendant was represented by Mr. Sheldon Halpern and Ms. Suzanna Kostovski.
>
> 3. At the conclusion of the testimony and arguments of counsel on July 14, respondent asked the parties to brief issues regarding the sufficiency of the evidence as to count 2, maintaining a drug house, and as to the execution of the search warrant.
>
> 4. On July 25, 2017, respondent sent the following email to APA Smith:
>
> **From**: Joe Filip
>
> **Sent**: Tuesday, July 25, 2017 2:17 PM
>
> **To**: Jeremiah Smith
>
> **Subject**: Rama Tyson - Maintaining
>
> Read: People v Tarone Washington, COA No. 330345; Unpublished July 6, 2014

5. The *Washington* case cited in respondent's email was relevant to the issue respondent had asked the parties to brief as to count 2, maintaining a drug house.

6. Respondent did not in any way inform either of the defendant's counsel of the *Washington* case.

7. Respondent did not provide a copy of his email to Mr. Smith to either of defendant's counsel.

8. Respondent presided over *People v Kathleen Adkins*, case numbers 16262SD and 17016SD.

9. The prosecution was represented by APA Smith and the defendant was represented by attorney Michael Dungan.

10. On June 28, 2017, respondent sent the following email to APA Smith:

From: Joe Filip

Sent: Wednesday, June 28, 2017 7:52 AM

To: Jeremiah Smith

Subject: Adkins OWIs

Take a read of People v Solmonson, 261 MA 657 (2004), cited in People Rassoull Omari Janes, COA Unpublished June 15, 2017 (I have a copy).

Perhaps Jerry Schrotenboer may have some thoughts as well.

11. The cases cited in respondent's email were relevant to an issue in the case.

12. Respondent did not in any way inform the defendant's counsel of these cases.

13. Respondent did not provide a copy of his email to Mr. Smith to defendant's counsel.

14. APA Smith informed his supervisor, Chief Assistant Prosecuting Attorney Kati Rezmierski, of respondent's email in the *Tyson* case. Chief APA Rezmierski provided a copy to *Tyson* defense counsel.

15. APA Smith provided *Adkins* defense counsel with a copy of the email respondent sent him pertaining to the *Adkins* case.

16. On September 8, 2017, respondent held a hearing on defense counsel Mr. Halpern's motion to disqualify respondent in the case of *People v Rama Tyson*. . . .

17. During the course of the September 8 hearing, respondent expressed his displeasure that APA Smith and Chief APA Rezmierski had alerted defense counsel to the ex parte communications. Respondent stated that APA Smith "handled himself in in [sic] a completely unprofessional manner, never notified me of his concerns . . ." (Transcript p. 3). Respondent also stated ". . . Mr. Smith is a fool that I suffered." (Transcript p. 8). Respondent also twice referred to Chief APA Rezmierski as a "cancer" in the prosecuting attorney's office. (Transcript p. 9).

The standards in *Brown* are also being applied to the Judicial Tenure Commission's legal conclusions to which the respondent stipulated and

which we adopt as our own. The Commission concludes, and we agree, that the respondent's conduct constitutes:

a. Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;

b. Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205;

c. Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1;

d. Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

e. Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;

f. Failure to respect and observe the law and to conduct himself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B;

g. Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2);

h. Lack of personal responsibility for his own behavior and for the proper conduct and administration of the court in which he presides, contrary to MCR 9.205(A);

i. Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4);

j. Participation in ex parte communications, and consideration of them outside the presence of all parties concerning pending or impending proceedings, in violation of Code of Judicial Conduct Canon 3A(4);

k. Conduct in violation of the Michigan Code of Judicial Conduct Canon 2B which states in part, "Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect,"; and,

l. Conduct in violation of the Michigan Code of Judicial Conduct Canon 3A(3) which states that a judge should be patient, dignified, and courteous to attorneys and others.

After review of the Judicial Tenure Commission's decision and recommendation, the settlement agreement, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable Joseph S. Filip be publicly censured. This order stands as our public censure.

BERNSTEIN, J., would remand to the Judicial Tenure Commission for further explication.

Leave to Appeal Denied March 8, 2019:

VAN BUREN CHARTER TOWNSHIP v VISTEON CORPORATION, No. 156018; reported below: 319 Mich App 538. On October 9, 2018, the Court heard oral argument on the application for leave to appeal the May 16, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's order denying leave to appeal. I believe that the circuit court and the Court of Appeals erred in holding that plaintiff's declaratory judgment claim was not ripe. The Court of Appeals then proceeded to determine whether the parties had any present rights or obligations under their settlement agreement, even though such a determination was not necessary to the Court's ripeness analysis. Regardless, I believe the Court of Appeals further erred by concluding that the parties had no present rights or obligations under the settlement agreement. Accordingly, I would vacate Part (III)(A) of the Court of Appeals' opinion and remand to the trial court for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

In 2002, defendant Visteon Corporation entered into discussions with plaintiff Van Buren Charter Township about the possibility of locating its national headquarters in the Township. Specifically, defendant discussed building its headquarters in plaintiff's Local Development Finance Authority District (LDFA District). In 2003, plaintiff issued over $28 million in bonds to assist in the construction of defendant's headquarters, known as "Visteon Village." Plaintiff projected that property-tax revenue from the LDFA District would cover the costs of bond issuance.

By 2006, tax revenues from the LDFA District were lower than projected, so plaintiff issued new bonds in order to advance refund a portion of the original bonds. This allowed plaintiff more time to pay the principal on the original bonds. As a result, plaintiff was able to temporarily avoid a shortfall, i.e., not having sufficient funds to make the bond payments.

Then, in 2009, defendant filed for bankruptcy. Plaintiff filed an unsecured claim to recover unpaid amounts from earlier tax abatement agreements. In 2010, the parties entered into a settlement agreement, which provided that plaintiff would significantly lower Visteon Village's assessed taxable value. In exchange, defendant agreed to pay $2.2 million toward plaintiff's claimed amount and to not object to the remainder of plaintiff's unsecured claim.[1] The settlement agreement also contained the following provision, the meaning of which is now in dispute:

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[1] Plaintiff subsequently sold the unsecured claim for approximately $5.7 million.

> Section 3. Bond Payments
>
> Visteon acknowledges that the Township assisted Visteon in the construction of the Village through the issuance by the Township of certain bonds supported by the full faith and credit of the Township, the proceeds of which were used to help construct the Village. To the extent that the property tax payments made by Visteon to the Township, including payments made by Visteon to the Township pursuant to Section 2.2, are inadequate to permit the Township to meet its payment obligations with respect to that portion of the bonds that were used to help fund the Village, Visteon hereby agrees to negotiate with the Township in good faith to determine the amount of the shortfall with respect to those bonds and make a non-tax payment, payment in-lieu-of tax, (PILOT) to the Township to assist the Township in making timely payments on the bonds.

Visteon emerged from bankruptcy later that year.

In 2013, plaintiff retained Public Financial Management (PFM) to conduct a cash-flow analysis to determine plaintiff's ability to pay on the bonds. In its report, PFM predicted that a shortfall ranging from $23.7 million to $36.4 million would occur sometime between 2017 and 2018.[2] Based on the report, plaintiff demanded that defendant enter into negotiations to determine defendant's payment obligations under the agreement with respect to the projected shortfall. Defendant met with plaintiff but argued that it had no obligation to negotiate until plaintiff experienced an actual shortfall and, even in the event of a shortfall, defendant argued that it may not owe plaintiff any amount under the contract.

Plaintiff filed suit, seeking both a declaratory judgment and damages for breach of contract. As to the declaratory judgment claim, plaintiff asked that the court "adjudicate the Parties' rights and obligations under the Settlement Agreement" and "enter a declaration that Visteon is responsible for payment of any shortfall . . . ." As to the breach of contract claim, plaintiff asserted that defendant breached the agreement by "(i) refusing to negotiate the amount of the Bond debt service shortfall in good faith and (ii) failing to provide – or commit to provide – the Township with funds to pay for any shortfall with the Bond debt service payments." Plaintiff also claimed anticipatory repudiation, pointing to certain statements made by defendant indicating that defendant did not believe it owed plaintiff anything under the agreement.

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[2] Because plaintiff used the payments made by defendant pursuant to the settlement agreement, as well as the funds obtained by the sale of the unsecured claim, to pay a portion of the interest on the bonds, the shortfall is now projected to occur in 2019.

Defendant filed a motion for summary disposition under MCR 2.116(C)(4) and (C)(8), arguing that plaintiff's claims were not ripe. Defendant argued that plaintiff's claims rested upon a hypothetical future shortfall; thus, no actual controversy presently existed. The trial court agreed, granting summary disposition in defendant's favor. On the record, the trial court explained its reasoning as follows:

> The Court agrees with the defendant that this case epitomizes why the ripeness doctrine exists, mainly to prevent courts from becoming prematurely embroiled in complex disputes involving hypothetical and contingent facts when, especially when the projected [shortfall] is estimated three years from now.

The Court of Appeals affirmed in a published opinion. In finding plaintiff's declaratory judgment claim unripe, the court explained:

> According to the plain language of the contract, defendant is obligated to "negotiate with [plaintiff] in good faith to determine the amount of the shortfall," but only "[t]o the extent that the property tax payments made by [defendant]" are "inadequate to permit [plaintiff] to meet its payment obligations" and only "with respect to that portion of the bonds that were used to help fund the Village." Thereafter, defendant is obligated to "make a non-tax payment" in order to "assist" plaintiff in making "timely" payments on those bonds. In each case, the tense of the verb is present, not future. No reasonable person reading this provision could find it ambiguous or conclude that defendant is obligated to engage in negotiations before the shortfall. Indeed, the contract admits of but one interpretation, in which the occurrence of the shortfall is a condition precedent to defendant's obligation to perform, and defendant is not obligated to do anything until after plaintiff has experienced a shortfall. In fact, defendant is not obligated to perform until after two conditions have been met: (1) a shortfall has occurred, and (2) property taxes paid by defendant are inadequate for plaintiff to pay that portion of the bonds that was used to fund the Village. This second condition cannot be met until *after* the shortfall has occurred and the parties have determined the amount due.
>
> Contrary to plaintiff's assertion on appeal, the requirement that defendant negotiate in good faith to "determine the amount of the shortfall" does not force the implication that defendant must be required to negotiate before the occurrence of a shortfall. Plaintiff forgets that the provision contains qualifying language, requiring defendant to negotiate in good faith to determine the amount of the shortfall only "with respect to those bonds" that were "supported by the full faith and credit of [plaintiff], the proceeds of which were used to help construct the Village." Defendant is therefore clearly obligated to engage in negotiations once a shortfall occurs, to determine which part of

> the shortfall can be attributed to bonds it is obligated to assist plaintiff to pay.[3]

Similarly, regarding plaintiff's breach of contract claim, the Court of Appeals found the claim unripe because "defendant could not have breached its contract by failing to perform before the time of performance has even arrived."[4] Further, the Court of Appeals explained that, "at least at this time, plaintiff's alleged damages are conjectural, speculative, and clearly 'dependent upon the chances of business or other contingencies.' "[5]

Following plaintiff's appeal to our Court, we ordered oral argument on the application, directing the parties to address

> whether the Court of Appeals: (1) properly determined that a declaratory judgment was not ripe under MCR 2.605; and (2) properly interpreted the contract to determine that "defendant is not obligated to perform [under the contract] until . . . a shortfall has occurred, and . . . property taxes paid by defendant are inadequate for plaintiff to pay that portion of the bonds that was used to fund the Village."[6]

II. ANALYSIS

A. RIPENESS OF PLAINTIFF'S DECLARATORY JUDGMENT CLAIM

Declaratory judgment in Michigan is governed by MCR 2.605, which provides in relevant part, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."[7] Regarding the purpose of the declaratory judgment rule, our Court has stated, "The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people."[8] "One great purpose is to enable parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful

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[3] *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 548-549 (2016).

[4] *Id*. at 554.

[5] *Id*. at 552, quoting *Doe v Henry Ford Health Sys*, 308 Mich App 592, 601 (2014).

[6] *Van Buren Charter Twp v Visteon Corp*, 501 Mich 1069 (2018).

[7] MCR 2.605(A)(1).

[8] *Shavers v Attorney General*, 402 Mich 554, 588 (1978).

bounds . . . ."[9] As noted by one scholar, "[p]robably one of the most useful functions of the declaratory judgment in preventing litigation lies in the fact that it enables parties to obtain in case of doubt and in advance of the necessity of acting upon their own interpretation of their obligations, with the resulting invitation of a lawsuit, an authoritative judicial interpretation of their mutual rights, powers, duties, etc., under written instruments."[10]

That a declaratory judgment must address an "actual controversy" is central to the legitimacy of the device. In *Washington-Detroit Theatre Co v Moore*, our Court considered the Legislature's second attempt to enact a declaratory judgment act that satisfied constitutional standards.[11] We had found the prior declaratory judgment act unconstitutional, explaining that "it requires that the time of the court shall be taken, not in the determination of actual controversies where rights have been invaded and wrongs have been done, but in the giving of advice to all who may seek it."[12] The new act, however, conditioned that a declaratory judgment was only available in " 'cases of actual controversies' " and was therefore constitutional.[13]

In order to satisfy the "actual controversy" requirement, a plaintiff's claim must be justiciable.[14] Thus, the "actual controversy" requirement

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[9] *Merkel v Long*, 368 Mich 1, 13 (1962), quoting *Sigal v Wise*, 114 Conn 297, 301-302 (1932).

[10] Borchard, *The Declaratory Judgment—A Needed Procedural Reform* (Washington, DC: United States Government Printing Office, 1919), p 45. See also 11 Williston on Contracts § 30:2 (4th ed), p 36 ("A frequently employed means of demonstrating in an authoritative manner the intent of the parties to a contract, either for the purpose of establishing rights or the nonexistence of liabilities, is the petition for declaratory judgment.").

[11] *Washington-Detroit Theatre Co v Moore*, 249 Mich 673 (1930). This act, 1929 PA 36, was codified into the Judicature Act and governed declaratory judgment actions in Michigan until it was repealed by the Revised Judicature Act, 1961 PA 236. In the same period, our Court adopted a rule governing declaratory judgment actions, GCR 1963, 521, now MCR 2.605. Thus, declaratory judgment actions in Michigan are no longer governed by statute, but instead are governed by court rule.

[12] *Anway v Grand Rapids R Co*, 211 Mich 592, 606 (1920).

[13] *Washington-Detroit Theatre Co*, 249 Mich at 676, quoting 1929 PA 36. *Anway* and *Washington-Detroit Theatre Co* have been widely cited by federal courts and our sister state courts in deciding the constitutionality of declaratory judgment acts within their jurisdictions.

[14] See *Shavers*, 402 Mich at 589 ("[A] plaintiff must allege and prove an actual *justiciable* controversy.").

contained in the court rule incorporates the concepts of standing, mootness, and ripeness.[15] Like in an ordinary action, ripeness in the declaratory judgment context requires a present legal controversy, not one that is merely hypothetical or anticipated in the future.[16] Unlike an ordinary action, however, in a declaratory action "a court is not precluded from reaching issues before actual injuries or losses have occurred."[17] Indeed, "the basic purpose of a declaratory judgment act is to provide for declaratory judgments without awaiting a breach of existing rights."[18]

In this case, plaintiff's request for a declaratory judgment involves a present legal controversy—it is a dispute over the parties' present rights and obligations under Section 3 of the 2010 settlement agreement. In particular, plaintiff argues that defendant has a present duty under the settlement agreement to negotiate with plaintiff to determine the amount of the projected shortfall and to make a payment to the township to assist it in making timely payments on the bonds; and defendant claims that it has no present duty under the agreement.

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[15] See *Associated Builders and Contractors v Dep't of Consumer & Industry Servs Dir*, 472 Mich 117, 125 (2005) ("Moreover, the rule requires that there be 'a case of actual controversy' and that a party seeking a declaratory judgment be an 'interested party,' thereby incorporating traditional restrictions on justiciability such as standing, ripeness, and mootness."), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010).

[16] Borchard, Declaratory Judgments (1934), p 40 ("When the complaint on these tests is considered premature, the dismissal may be explained by any one of a series of labels, *e.g.*, that there is as yet no 'controversy,' that the issue is hypothetical, that the result would be only an advisory opinion, etc."); 26 CJS, Declaratory Judgment, § 28, p 66 ("[A] controversy is justiciable, such that a declaratory judgment action may be maintained, when present legal rights are affected, not when a controversy is merely anticipated.").

[17] *Shavers*, 402 Mich at 589. See also 26 CJS, Declaratory Judgment, § 28, p 67 ("A party should not be forced to wait until the event giving rise to the claim occurs before a court may determine the party's rights and obligations in a declaratory judgment action.").

[18] *Id*. See also 9A Michigan Pleading & Practice (2d ed), § 69:8, p 390-391 ("[A]n actual present controversy, justifying a declaratory judgment, is present where uncertainties and controversies arise between interested parties about what their respective rights will be when those rights accrue or become vested, and it is necessary to have those rights determined at the present time to avoid needless hazards or possible losses in the future. In these situations, courts are not precluded from reaching issues before actual injuries or losses have occurred.").

Thus, even if plaintiff has not yet shown an injury, plaintiff has presented an "actual controversy" within the meaning of MCR 2.605.[19]

It may be true, as defendant argues, that determining the exact amount of defendant's liability is not possible at this time.[20] This is not relevant, however, to plaintiff's declaratory judgment claim. Plaintiff's declaratory judgment claim does not seek a specific amount of damages, but instead seeks a declaration of the parties' present obligations under the settlement agreement.[21] To the extent that the Court of Appeals found plaintiff's declaratory judgment claim unripe because the Court

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[19] Even if the Court of Appeals was correct that defendant has no obligations under the settlement agreement until after a shortfall occurs, and that therefore plaintiff's claim only involved future rights and obligations, its conclusion that plaintiff's claim was unripe would still be on shaky ground. It is true that, generally, a declaratory judgment must address "the existing law on an existing state of facts." Borchard, Declaratory Judgments, p 40. But this is not an inflexible rule—a declaratory judgment may address parties' rights under future, or even contingent, events or circumstances. *Id*. at 44 ("[C]ourts have been less inclined to refuse declarations where they were convinced that the future event was certain or practically certain to occur, and that a useful purpose could be served, whereas theretofore they were disposed to ask for more accrued facts as a condition of adjudication."). Indeed, as we have previously recognized, " 'to carry out the purposes intended to be served by [declaratory] judgments, it is sometimes necessary to determine rights which will arise or become complete only in the contingency of some future happening.' " *Merkel*, 368 Mich at 13, quoting *Sigal*, 114 Conn at 301-302. "Courts continually declare rights which have not become fixed under an existing state of facts, but are prospective only; they may not, however, be so remote and speculative as to be hypothetical and abstract." *Merkel*, 368 Mich at 13, quoting Borchard, Declaratory Judgments (2d ed), pp 422-424. Thus, the Court of Appeals erred by assuming that, if plaintiff's claim involved future rights and obligations, it could not be ripe.

[20] See Appellee's Answer Brief at 27 ("But even if the Township is right that a shortfall in some amount is "certain" to occur at some point in the future, when that might happen is simply unknown. More importantly, there is no way to know what the amount of any shortfall might be.").

[21] It is true that plaintiff's complaint sought a declaration that defendant was obligated to pay the full amount of any shortfall. See Plaintiff's Complaint at 14-15 ("WHEREFORE, the Township seeks a declaratory judgment pursuant to MCR 2.605 to adjudicate the Parties' rights and obligations under the Settlement Agreement, and the Township respectfully requests the Court enter a declaration that Visteon is responsible for payment of any shortfall in the Bond debt service payments identified in this Complaint, as well as any other relief as

could not determine the exact amount of defendant's liability at this time, the Court of Appeals erred in this regard as well.[22]

For these reasons, plaintiff's claim as to the parties' rights and obligations under the agreement is ripe for adjudication.

B. THE COURT OF APPEALS' INTERPRETATION OF THE SETTLEMENT AGREEMENT

Had the Court of Appeals merely held that plaintiff's claim was not ripe, my analysis would end here. However, the Court of Appeals proceeded to partially determine the parties' rights and obligations under the settlement agreement, stating as follows:

> [T]he contract admits of but one interpretation, in which the occurrence of the shortfall is a condition precedent to defendant's obligation to perform, and defendant is not obligated to do anything until after plaintiff has experienced a shortfall. In fact, defendant is not obligated to perform until after two conditions have been met: (1) a shortfall has occurred, and (2) property taxes paid by defendant are inadequate for plaintiff to pay that portion of the bonds that was used to fund the Village. This second condition cannot be met until *after* the shortfall has occurred and the parties have determined the amount due.[23]

In so holding, the Court of Appeals essentially entered a partial declaratory judgment determining when defendant's obligations under the contract are triggered. Having concluded that plaintiff's declaratory judgment claim is ripe for adjudication, I now believe it necessary to address the Court of Appeals' determination that defendant's contractual duties are not triggered until a shortfall has occurred.

In concluding that defendant has no obligation under the contract until after a shortfall has occurred, the Court of Appeals relied primarily on the verb tense used in the settlement agreement, explaining:

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justice and fairness require."). Even this, however, is not a request for the court to determine the exact amount of a shortfall. Instead, plaintiff is seeking an interpretation of the settlement agreement that would require defendant to pay the full amount of the shortfall, whatever that amount might be.

[22] While the impossibility of determining plaintiff's actual damages at this time does not render plaintiff's declaratory judgment claim unripe, it does affect plaintiff's breach of contract claim, which requires plaintiff to make a showing as to damages. Accordingly, I would not disturb the Court of Appeals' holding as to plaintiff's breach of contract claim.

[23] *Van Buren*, 319 Mich App at 548.

> [T]he tense of the verb[s] is present, not future. No reasonable person reading this provision could find it ambiguous or conclude that defendant is obligated to engage in negotiations before the shortfall. Indeed, the contract admits of but one interpretation, in which the occurrence of the shortfall is a condition precedent to defendant's obligation to perform, and defendant is not obligated to do anything until after plaintiff has experienced a shortfall.[24]

We have relied on verb tense in the past when interpreting legal texts.[25] We have also recognized, however, that verb tense is not always determinative and must be considered in the context of the surrounding text.[26] Accordingly, a close inspection of the verbs contained within the agreement is necessary to determine whether the Court of Appeals is correct that the verb tense is indicative of the timing of defendant's obligations. The agreement uses the following verbs: "To the extent that the property tax payments . . . *are* inadequate *to permit* the Township *to meet* its payment obligations . . . , Visteon hereby *agrees to negotiate* with the Township in good faith *to determine* the amount of the shortfall with respect to those bonds and *make* a non-tax payment . . . to the Township *to assist* the Township in making timely payments on the bonds." (Emphasis added.)[27] With two exceptions—"are" and "agrees"—each of the verbs identified above is in the infinitive form.[28] Unlike finite verbs, infinitives primarily function as nouns, adjectives, or adverbs,[29] and are widely considered to have no tense.[30] Additionally, when an

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[24] *Id*.

[25] See, e.g., *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 176 (2017) (noting that the phrase "already receiving" within MCL 124.3(2) is a present participle and that "[t]he verb tense is meaningful here because it indicates a present-tense lens").

[26] See *Rock v Crocker*, 499 Mich 247, 263 (2016) (recognizing that "the Legislature deviated from the general rules of grammar in MCL 600.2169(1)(a) by using the present tense when referring to an event that had already occurred").

[27] "Making" is a gerund in this context, which functions as a noun. See *The Chicago Manual of Style* (16th ed), p 233.

[28] *Id*. at 232 ("An infinitive verb, also called the verb's root or stem, is a verb that in its principal uninflected form may be preceded by *to*.").

[29] See Vitto, *Grammar by Diagram: Understanding English Grammar Through Traditional Sentence Diagramming* (2d ed), p 219.

[30] See Garner, *Garner's Modern English Usage* (4th ed), p 853 ("An infinitive is the tenseless form of a verb preceded by *to*, such as *to dismiss* or *to modify*."). But see Stowell, *The Tense of Infinitives*, 13 Linguistic Inquiry 561 (1982) (discussing infinitive tenses). Moreover, the infinitives here clearly serve functions unrelated to the timing of

infinitive is paired with a present tense finite verb, such as "agrees to negotiate," the result can indicate either present or future action.[31] Thus, while "agrees" is in present tense, because it is paired with the infinitive it may refer to either present or future obligations.

We are left, then, to determine whether the agreement's single remaining use of present tense in the noninfinitive form—"are inadequate"—is sufficient to conclude that defendant's obligations under the agreement come into effect at the time of the shortfall. The Court of Appeals' interpretation of the agreement assumed that the property-tax payments will become "inadequate" at the time that the shortfall occurs. This is not the only possible reading, however. The agreement may, alternatively, consider the payments "inadequate" when a shortfall is projected to occur. Under this reading, the tax payments are *presently* inadequate because they will not allow plaintiff to continue making timely payments. Because both of these readings are grammatically acceptable, I do not think the use of present tense for "are inadequate" necessarily leads to the Court of Appeals' conclusion.

Accordingly, we must look to the remainder of the provision to determine the appropriate interpretation. As plaintiff points out, the agreement requires that defendant "make a non-tax payment . . . to assist [plaintiff] in making timely payments." "Timely" is defined as "coming early or at the right time."[32] Suffice it to say that, if defendant is not obligated to even begin negotiations until after a shortfall occurs, then plaintiff's payments to the bond holders will not be "coming early or at the right time." The Court of Appeals sweeps this concern aside, concluding that the agreement is "perhaps inartfully worded."[33] However, I believe the meaning is clear: defendant is required to "make a non-tax payment . . . to [plaintiff] to assist [plaintiff] in making timely payments"—i.e., to make whatever payment is owed, if any, before the shortfall occurs.

The agreement also requires that defendant "negotiate with the Township in good faith to determine the amount of the shortfall with respect to those bonds [that were used to help fund the Village]."

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defendant's obligations. "[T]o permit," "to determine," and "to assist" all function as adverbs, denoting the purpose of defendant's agreed-to actions. See Vitto, pp 222-224. Similarly, "to meet," "to negotiate," and "[to] make" are each nouns, functioning as the direct objects of "permit" and "agrees." *Id*. at 221. Thus, each of the infinitives in the agreement is functioning not as a verb, whose tense could indicate the timing of defendant's obligations, but instead as either an adverb or a noun.

[31] See Curme, *College English Grammar* (Richmond: Johnson Publishing Company, 1925), p 301 ("Here the present tense indicates time contemporaneous or future with reference to that of the principal verb: I wish *to go* at once. I intend *to write* a line or two to her soon. Yesterday I intended *to write* a line to her, but forgot it.").

[32] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[33] *Van Buren Charter Twp*, 319 Mich App at 547.

Plaintiff argues that this clause requires defendant to negotiate with plaintiff before a projected shortfall to estimate the amount of the shortfall. Defendant, on the other hand, argues that this clause only requires defendant to negotiate with plaintiff at the time of the shortfall to determine the proportion of the shortfall that correlates with the bonds that were issued to assist with the construction of Visteon Village. The word "amount," however, refers not to a proportion, but to a "quantity."[34] Thus, under the agreement, the parties must negotiate the "quantity" of the shortfall, not merely the percentage of the shortfall correlating to the relevant bonds. Because the agreement requires the parties to negotiate a quantity, I believe the agreement contemplates negotiations before a shortfall has occurred. Otherwise, as plaintiff argues, the parties would have nothing to negotiate—the amount would already be determined.

For the reasons stated above, I believe the parties' agreement clearly contemplates that defendant has an obligation prior to the occurrence of a shortfall: (1) to negotiate with plaintiff to determine the amount of the projected shortfall, and (2) to make whatever payment it may owe to plaintiff to assist it in making timely payments on the bonds. Determining the nature and extent of defendant's obligations in the first instance is a task properly left to the trial court.

III. CONCLUSION

I believe the Court of Appeals erred in its published opinion by finding plaintiff's declaratory-judgment action unripe and in its determination that the parties had no present rights or obligations under the settlement agreement. Accordingly, I would vacate Part (III)(A) of the Court of Appeals' opinion and remand to the trial court for further proceedings.

MCCORMACK, C.J., joins the statement of VIVIANO, J.

BERNSTEIN, J., would reverse the judgment of the Court of Appeals.

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

WALKER V UNDERWOOD, No. 156651; Court of Appeals No. 333160. On January 23, 2019, the Court heard oral argument on the application for leave to appeal the September 7, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied.

ZAHRA, J. (*dissenting*). I respectfully dissent. In this case, defendant agreed to develop a part of a building that he owned for plaintiffs Donna and William Walker, who planned to lease the space for their business, Head to Toes Massage Therapy of Oxford, Inc. The agreement was memorialized in a written contract (the letter agreement) that the

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[34] See *Merriam-Webster's Collegiate Dictionary* (defining "amount" as "the total number or quantity" and "the quantity at hand or under consideration").

parties signed. Although the letter agreement provided that defendant would "use all reasonable efforts/expense to obtain a final occupancy permit," defendant experienced continual delays in doing so. After nine months without the necessary occupancy permit, plaintiffs' attorney sent a letter to defendant indicating that they had decided "to terminate their interest in any and all obligations regarding the property."

Plaintiffs filed suit, seeking damages resulting from the delay. Defendant moved for summary disposition, arguing that plaintiffs were not entitled to such relief under the terms of the letter agreement. In support of his position, defendant pointed to paragraph 10 of the letter agreement, which specifically outlined the remedies agreed to by the parties, stating:

> 10. The failure of either party to perform the preliminary duties outlined in this agreement will permit the obligee of the duty to declare a default and terminate this preliminary agreement to lease or other remedy that may be agreed to by the parties.

The trial court held that paragraph 10 was clear and unambiguous, granting summary disposition in defendant's favor. A divided panel of the Court of Appeals reversed, however, with the majority reasoning that paragraph 10 did not contain any language expressly limiting the parties to the two remedies specified therein.[1] Judge O'BRIEN drafted a partial dissent, in which she opined that the majority's holding effectively rendered paragraph 10 meaningless.[2]

I, like Judge O'BRIEN, am persuaded that the panel majority's holding does not comport with the rule against surplusage. That is, "courts must [] give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory."[3] Paragraph 10 is inartfully drafted with regard to the second remedy, which awkwardly allows for the pursuit of an alternative remedy agreed to by the parties. Nevertheless, considered as a whole, paragraph 10 is clear, concise, and cannot be ignored as surplusage. To hold, as the panel majority has, that the parties in this case were not limited in the remedies available writes paragraph 10 out of the contract entirely.

Further, I note the well-established principle that "[i]n interpreting a contract, our obligation is to determine the intent of the contracting

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[1] *Walker v Underwood*, unpublished per curiam opinion of the Court of Appeals, issued September 7, 2017 (Docket Nos. 332129 and 333160), pp 2-4.

[2] *Id*. at 4-5 (O'BRIEN, J., dissenting).

[3] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

parties."[4] "[T]he intent of the contracting parties is best discerned by the language actually used in the contract."[5] It seems peculiar to me that the letter agreement would include a provision that details two specific remedies—neither of which is unique to this manner of contract or these particular circumstances—if the parties did not intend for those remedies to be exclusive.

For these reasons, I would peremptorily reverse the decision reached by the Court of Appeals panel majority and reinstate the trial court's order granting summary disposition.

MARKMAN, J., joins the statement of ZAHRA, J.

SHERMAN v ISRAEL BROS, INC, No. 158038; Court of Appeals No. 333514.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal for the reasons set forth in my dissenting statement in *Thompson v Gibson*, 503 Mich 973 (2019) (MARKMAN, J., dissenting). This case, as with *Thompson*, concerns whether a landlord possessed constructive notice of a defect within leased premises that caused injury to a tenant. In my judgment, the Court of Appeals majority failed to recognize and address the proper legal inquiry as laid out in my *Thompson* dissent; i.e., it failed to examine whether the landlord knew or should have known of the defect *before* leasing the property. However, unlike in *Thompson*—in which this Court has already once remanded for reconsideration—in the instant case, the Court of Appeals has not had the opportunity to reconsider its conclusion in light of clearly applicable legal principles. Moreover, the proper application of these principles in the instant case is somewhat less clear than in *Thompson*, given that plaintiffs here provided expert testimony (although arguably of insufficient precision) regarding the duration of the alleged defect, and the specific nature of that defect—corrosion of a water heater—seems somewhat more likely to have arisen over a substantial period of time than the defect in *Thompson*. While I am unsure whether this evidence gives rise to a genuine issue of material fact that the landlord should have known of this defect when the lease was signed four years before the injury occurred, the issue nonetheless is worthy of plenary appellate review under the proper legal standard. Accordingly, I would remand to the Court of Appeals for reconsideration in light of the legal framework set forth in my dissent in *Thompson*.

BRICKEY v MCCARVER, No. 158060; reported below: 323 Mich App 639.

ZAHRA, J. (*concurring*). I concur in the denial of leave because the pertinent provisions of the no-fault act, MCL 500.3101 *et seq*., do not bar an award of damages to a party operating his or her uninsured motorcycle when that person is involved in an accident with a motor vehicle and sustains injuries. This may be a legislative oversight that

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[4] *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

[5] *Rory v Continental Ins Co*, 473 Mich 457, 469-470 n 21; 703 NW2d 23 (2005).

can be corrected only through the legislative process. This case raises perhaps the most perverse aspect of the Michigan no-fault act: that is, the proposition that a person may drive a motorcycle without insurance and receive no-fault benefits if the person is merely "involved" in an accident with a motor vehicle and sustains injury. This is based on MCL 500.3114(5), which allows "[a] person suffering accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers . . . ." Further, MCL 500.3135(2)(c) only precludes an award of damages for "a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by [MCL 500.3101] at the time the injury occurred." The security requirement in MCL 500.3101 applies to owners or registrants of motor vehicles, but expressly provides that the term "motor vehicle" does not include a motorcycle. Because MCL 500.3101 does not require security on motorcycles, the fact that plaintiff's motorcycle was uninsured does not preclude his action for tort damages.

MARKMAN, J., joins the statement of ZAHRA, J.

THOMPSON v GIBSON, No. 158361; Court of Appeals No. 333755.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. In my judgment, the Court of Appeals' decision represents a fundamental misunderstanding of the common law of this state with regard to the duty imposed on landlords. More specifically, the panel's analytical errors improperly render landlords liable for defects in leased premises that arise *after the tenants have taken possession of the premises*. The duty to discover such defects rests primarily on the premises possessor, i.e., the tenant, rather than the landlord, as the tenant is better situated to discover such defects than the landlord is. Because I believe that the Court of Appeals improperly shifted the duty to discover defects that arise during the tenant's possession of the premises from the tenant to the landlord, I would reverse.

In this case, plaintiff, Steven Thompson, signed a one-year lease to reside in a home owned by defendant, Ann Gibson. Approximately 10 months after signing the lease, plaintiff was injured while sweeping debris off the back deck of the home, which was within the leased premises. Plaintiff placed his left hand on the rail to sweep the debris off the edge and the rail "freely gave way." In an affidavit, plaintiff averred that the rail was completely detached from the post, had no visible nails, and had a hole where it appeared a nail had once been. Plaintiff did not notice the defect in the rail before the injury occurred, and neither plaintiff nor the previous tenant notified defendant about a problem with the rail. Plaintiff sued for nuisance and also brought a negligence claim under a premises-liability theory. The trial court granted defendant's motion for summary disposition on both counts, but the Court of Appeals reversed with respect to the negligence claim. *Thompson v Gibson*, unpublished per curiam opinion of the Court of Appeals, issued August 8, 2017 (Docket No. 333755) (*Thompson I*). This Court vacated the part of the Court of Appeals judgment addressing premises liability

and remanded to that court to address this Court's decision in *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1 (2016). *Thompson v Gibson*, 501 Mich 1087 (2018). On remand, the Court of Appeals once again reversed the trial court, concluding that genuine issues of material fact precluded summary disposition of plaintiff's negligence claim. *Thompson v Gibson (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued July 24, 2018 (Docket No. 333755) (*Thompson II*).

The issue is whether plaintiff has raised a genuine issue of material fact that defendant (the landlord) possessed constructive notice of the defect that injured plaintiff during his lease of the property. As this Court recently explained:

> A premises owner breaches its duty of care when it "knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." [*Lowrey*, 500 Mich at 8, quoting *Hoffner v Lanctoe*, 492 Mich 450, 460 (2012).]

Accordingly, to establish a negligence claim based on premises liability, a plaintiff must show that the premises owner had "actual or constructive notice of the dangerous condition." *Id*. at 10. Because it is undisputed here that defendant did not possess actual notice of the defect, the determinative question is whether there is a genuine issue of material fact that defendant possessed constructive notice, i.e., whether "the hazard was of such a character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it." *Id*. at 11-12.

The Court of Appeals noted that a landowner possesses a duty to " 'inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards,' " *Thompson II*, unpub op at 4 n 3, quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597 (2000), and then held that a reasonable jury could conclude that defendant should have discovered the defect in the rail upon reasonable inspection, *id*. at 5-7. If the injury in this case had occurred in a retail commercial context, I might well agree with that conclusion. However, the Court of Appeals seemingly failed to recognize the significance of the *lease* of the property to the constructive-notice inquiry.[1] " 'Premises liability is conditioned upon the presence of both

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[1] This failure may have been caused, in part, by the Court of Appeals' published decision in *Grandberry-Lovette v Garascia*, 303 Mich App 566 (2014), overruled in part on other grounds by *Lowrey*, 500 Mich at 10 n 1, a decision the Court of Appeals in the instant case cited in its opinion. In *Grandberry-Lovette*, the defendant leased his home through a county-operated program to several persons with disabilities. *Id*. at 570. The plaintiff, who worked as a healthcare aide to assist the residents, was injured when she fell after a step on the stairs leading to the porch broke. *Id*. at 570-571. In analyzing whether the landlord had constructive notice of the defect on the stairs, the Court of Appeals noted a

possession and control over the land.' " *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 566 (1997) (citation and emphasis omitted); see also *Bailey v Schaaf*, 494 Mich 595, 608 (2013) (stating that "the element of control forms the basis of imposing a duty to invitees"). In the context of a landlord's duty to his or her tenants, we explained more than 50 years ago:

> The element of control is of prime importance. The common-law duty is predicated upon the concept that a lease is equivalent to a sale. The lessor, absent agreement to the contrary, surrenders possession and holds only a reversionary interest. Under such circumstances, he is under no obligation to look after or keep in repair premises over which he has no control.
>
> An exception to the general lack of obligation is that a landlord has a duty to keep in safe condition any portion of a building under his control. The duty extends to a tenant's invitees. [*Lipsitz v Schechter*, 377 Mich 685, 687-688 (1966) (citations omitted), superseded in part by MCL 554.139(1)(b).]

Subsequent cases have reaffirmed this principle, holding that "[t]he landlord is not liable for injuries that occur within the boundaries of the leased premises," *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499 n 10 (1988), and that

> a landlord's duty does not extend to the areas within a tenant's leasehold, because the landlord has relinquished its control over that area to the tenant. This relinquishment of control extinguishes the landlord's duty of reasonable care over those areas. [*Bailey*, 494 Mich at 609 n 36 (citations omitted).]

This is because " 'after leasing and surrendering the premises to the tenant the landlord loses all control over them,' " and " 'liability for an injury due to defective premises ordinarily depends upon power to prevent the injury and therefore rests primarily upon him who has control and possession.' " *Sholberg v Truman*, 496 Mich 1, 10-11 (2014) (citations omitted). Accordingly, defendant's common-law duty to inspect the premises ended when plaintiff signed the lease.[2]

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premises possessor's duty to inspect the premises without considering the possibility that the landlord no longer had a duty to inspect in light of the lease of the property. See *id*. at 573-580. To the extent that the panel here followed the lead of *Grandberry-Lovette* when it failed to recognize the significance of the lease to the constructive-notice inquiry, this is a consequential error and one that is likely to redefine the common law in the realm of landlord tort liability.

[2] As recognized by the Court of Appeals in *Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 696-697 (2001), this Court overruled part of *Lipsitz*'s reasoning in *Mobil Oil Corp v Thorn*, 401 Mich 306, 311-313

It appears that this Court has not expressly addressed the inference arising from the leasing of premises concerning whether a landowner possesses constructive notice of a defect. Nevertheless, the implication seems fairly straightforward to me: because a landlord has no duty to inspect when the premises are being leased, the landlord necessarily possesses constructive notice of a defect within the leased premises only if he or she should have known of the defect *before* leasing the property.[3] If, however, the defect only arose (or became readily apparent) *after* leasing the property, the landlord would not have reason to know of the defect unless by some other means specifically informed of it. To hold otherwise would effectively shift responsibility from those in possession and control of the property (the tenants) to those who no longer have such possession and control, in contradiction of well-established common-law principles. By entering into a leasing agreement, plaintiff accepted primary responsibility for the condition of the property during the term of the lease, which includes the duty to discover and to report to the landlord defects arising during the term of that lease. See *Sholberg*, 496 Mich at 10-11.

As relevant to this case, the nature of the defect—an "unanchored or loosely anchored safety railing on a back deck that 'gave freely' and [did so] almost instantly the second [plaintiff] leaned against it," *Thompson II*, unpub op at 5—certainly suggests that the defect had existed for some time before the injury occurred. However, there is no evidence that the defect existed—let alone would have been apparent upon reasonable inspection—*at the time the lease was signed*. The defect could have arisen one week earlier, three months earlier, or five years earlier; the jury could only speculate that it had (or had not) arisen and was (or was not) readily apparent *ten months* before the injury occurred. While the

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(1977), in which we held, relying on § 357 of the Second Restatement of Torts, that a lessor can be held liable in tort for a failure to repair leased premises during the term of the lease in accordance with the statutory covenant of reasonable repair in MCL 554.139(1)(b). However, MCL 554.139(1)(b) does not require the landlord to inspect the premises, see *Raatikka v Jones*, 81 Mich App 428 (1978), and therefore one is only liable in tort under MCL 554.139(1)(b) "if he does not exercise reasonable care *after he has had notice* of the need of repairs," 2 Restatement Torts, 2d, § 357, comment *d*, pp 242-243 (emphasis added). Thus, *Lipsitz*, along with *Williams* and *Bailey*, continue to support the proposition that a landowner's duty to *inspect the premises* must generally end upon the leasing of property to another.

[3] Of course, a lessor would also be liable under *Mobil Oil Corp* if the tenant had informed the lessor of the defect or the lessor *voluntarily* inspected the premises and discovered the existence of a defect, yet failed to repair that defect. However, plaintiff here did not know of the existence of the defect before the injury occurred, let alone inform the landlord of the defect. Moreover, it is undisputed that defendant did not have actual knowledge of the defect before the injury occurred.

party opposing a motion for summary disposition is entitled to all reasonable inferences that arise from the evidence, it may not defeat such a motion with mere speculation. *Bernardoni v City of Saginaw*, 499 Mich 470, 475 (2016). Accordingly, I would conclude that plaintiff, upon whom the burden of proof clearly rests, has failed to sufficiently demonstrate that there is a genuine issue of material fact that defendant was on constructive notice of the defect that caused plaintiff's injuries.

CONSEQUENCES

The common law reflects the practices and common sense of society. See, e.g., *Gildersleeve v Hammond*, 109 Mich 431, 438 (1896) (explaining that "sound reason, common sense, and common honesty . . . are the foundation of the common law"). Moreover, individual responsibility for one's own safety remains a core tenet of the common law. See *Hoffner*, 492 Mich at 460 (recognizing that under the common law one has an "obligation to assume personal responsibility to protect [oneself] from apparent dangers"); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617 (1995) (recognizing "the overriding public policy of encouraging people to take reasonable care for their own safety"). The common-law rule that premises liability is " 'conditioned upon the presence of both possession and control over the land,' " *Orel*, 454 Mich at 568 (citation and emphasis omitted), is altogether consistent with these principles of common sense and personal responsibility for at least two reasons. First, tenants who possess and control property will almost certainly be better situated to discover defects that *arise during their tenancy* than the landlord. As a result, it makes sense to apportion primary responsibility for discovering such defects to the tenant. Second, tenants who possess primary control over property will almost certainly be better situated to remedy an existing defect (or to call it to the attention of the landlord) and thus to prevent injury as a result of such a defect. By the act of leasing property, a landlord " 'surrender[s] the premises to the tenant' " and thereby " 'loses all [or significant] control over them.' " *Sholberg*, 496 Mich at 10 (citations omitted).

In short, by signing a lease, a tenant accepts primary responsibility for the conditions of premises during the term of the lease because he or she is better positioned than the landlord to detect and remedy defects within the leasehold. It would make little sense to hold the landlord responsible for an injury that he or she could not have reasonably discovered or prevented, especially when the tenant is better positioned in these regards. Such a result seemingly would do little to forestall future injuries while increasing the financial burdens upon landlords and indirectly upon their tenants, while also generating greater legal uncertainty and litigation. Because I believe that the instant result is unsupported by the reasonable application of the common law of this state, I would reverse the Court of Appeals judgment.

ZAHRA, J., joins the statement of MARKMAN, J.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

In re RJK TIMON, MINOR, No. 158703; Court of Appeals No. 342031.

Leave to Appeal Denied March 13, 2019:

In re RC, MINOR, Nos. 159168 and 159169; Court of Appeals Nos. 345959 and 346102.

PEOPLE v DAJON HOGAN, No. 159222; Court of Appeals No. 345822.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

Leave to Appeal Denied March 15, 2019:

HENDERSON v CIVIL SERVICE COMMISSION, No. 156270; reported below: 321 Mich App 25. On January 23, 2019, the Court heard oral argument on the application for leave to appeal the August 15, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied.

MARKMAN, J. (*concurring*). I concur with this Court's order denying leave to appeal. As Justice CAVANAGH observes in her concurring statement, although the predecessor Attorney General previously argued in this Court that the test set forth in *Brandon Sch Dist v Mich Ed Special Servs Ass'n*, 191 Mich App 257, 263 (1991), for determining whether an agency decision is "authorized by law" is inconsistent with the common understanding of Const 1963, art 6, § 28, the present Attorney General, as is her prerogative, expressly abandoned that position at oral argument.[1] Furthermore, as Justice CAVANAGH also observes, a review for whether the decision is "arbitrary and capricious"—which constitutes the fourth component of the *Brandon* test—contemplates a "minimum level of review of the evidentiary record in order to ensure that there is *some* evidentiary support for [the] decision." I write separately only to note that this Court by its order today does not decide that an "arbitrary and capricious" review *does* comport with the "authorized by law" standard, as the Court of Appeals held in *Brandon*.

For the following reasons, it is at least reasonably arguable that the "authorized by law" standard does not include an "arbitrary and capricious" review. First, *Black's Law Dictionary* (5th ed) defines "authorize" as "[t]o empower; to give a right or authority to act. . . . 'Authorized' is sometimes construed as equivalent to 'permit-

[1] Specifically, the Assistant Attorney General stated at oral argument in this regard that, in the Attorney General's own supplemental briefing to this Court, "we took the position that it would not have been understood at the time [of the Constitution's ratification in 1963] to include whether the decision is arbitrary and capricious. I can represent to the Court at this time that we are no longer advancing that argument, it is not necessary to reach that issue in this case, [and] we are not asking the Court to reach that issue . . . ."

ted' . . . ." From this definition, "authorized by law" essentially means "empowered by law to act." Arguably, whether an agency is empowered by law to act is determined *only* by reference to the presence or absence of a constitutional provision, statute, or regulatory enactment sustaining the underlying authority of the agency action.

Second, the term "authorized by law" appears in multiple (specifically, six) other sections of our Constitution. And in those sections, "authorized by law" is used in a manner consistent with the above understanding of that phrase, i.e., as meaning only "empowered by law to act." For instance, Const 1963, art 12, § 2 provides that petitions to amend the Constitution "shall be filed with the person *authorized by law* to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon." (Emphasis added.) This provision sets forth a straightforward reference to the person empowered by statute, the Secretary of State, to receive amendment petitions. See MCL 168.471. See also Const 1963, art 2, § 9; Const 1963, art 9, § 31; Const 1963, art 9, § 40; Const 1963, art 9, § 41; and Const 1963, art 9, § 42. There is no obvious reason why "authorized by law" in Const 1963, art 6, § 28 should be understood in a disparate manner from other constitutional provisions in which it appears to include review of the evidentiary record.

Third, concluding that the "authorized by law" standard permits courts to consider the evidentiary record to assess agency findings of fact would seem to constitute a somewhat unorthodox reading of Const 1963, art 6, § 28 as a whole. That provision includes one, and only one, clause concerning court review of agency findings of fact: "[I]n cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." That is, Const 1963, art 6, § 28 explicitly includes a provision allowing review of the evidentiary record, and that provision only pertains to "cases in which a hearing is required." By negative implication alone, that would arguably constitute the *only* circumstance in which review of the evidentiary record is allowed.

Finally, although obviously not binding upon our interpretation of the Constitution, federal courts have asserted that an "arbitrary and capricious" standard of review and the "substantial evidence" test under the federal Administrative Procedure Act, 5 USC 551 *et seq*., are similar, if not identical, in assessing agency findings of fact. See, e.g., *AllCare Home Health, Inc v Shalala*, 278 F3d 1087, 1089 (CA 10, 2001) ("The arbitrary and capricious standard of review has been equated to the substantial evidence test."). Thus, if this Court included an "arbitrary and capricious" review in the "authorized by law" standard under Const 1963, art 6, § 28, it would conceivably lead to a peculiar outcome—to wit, the provision would *explicitly* provide for a "substantial evidence" test in cases in which a hearing is required and it would *implicitly* provide for the same examination of the record through an "arbitrary and capricious" review in cases in which a hearing is not required. Can this be what was understood by the ratifiers of our Constitution?

CAVANAGH, J. (*concurring*). I concur in the denial of leave to appeal in this case, but write separately to clarify the appropriate evidentiary review of agency decisions under the "authorized by law" standard of Const 1963, art 6, § 28.

Const 1963, art 6, § 28 provides for "direct review by the courts" of whether agency final decisions, findings, rulings and orders are "authorized by law . . . ." I agree with the Court of Appeals that, because no hearing was held in this case, the circuit court's review of the Civil Service Commission's decision and findings should have been limited to whether they were authorized by law and not extended to apply the broader "competent, material and substantial evidence" test in § 28. As the Court of Appeals properly held, and as both parties now agree on appeal, the proper test for determining whether a final decision, finding, ruling, or order is authorized by law is the four-factor test articulated in *Brandon Sch Dist v Mich Ed Special Servs Ass'n*, 191 Mich App 257, 263 (1991).[1] That test asks whether the final decision, finding, ruling, or order is (1) "in violation of a statute," (2) "in excess of the statutory authority or jurisdiction of the agency," (3) "made upon unlawful procedures resulting in material prejudice," or (4) "arbitrary and capricious." *Id*. A decision is arbitrary and capricious when it (1) "lacks an adequate determining principle," (2) reflects an absence of consideration of significant principles or circumstances, or (3) is "freakish or whimsical." *Wescott v Civil Serv Comm*, 298 Mich App 158, 162 (2012).

I disagree with the Court of Appeals that review of the evidentiary support for an agency's final decision, finding, ruling, or order is not proper under "authorized by law" review—and notwithstanding that statement, I believe that the Court of Appeals actually conducted the appropriate review of the evidentiary record in this case. While the "arbitrary and capricious" standard of review necessarily must be more deferential than the "competent, material and substantial evidence" standard applicable to decisions following hearings, the "arbitrary and capricious" standard must mean *something* in order to effectuate the Constitution's requirement of direct review. While the exact contours of the boundary between "arbitrary and capricious" review and "competent, material and substantial evidence" review have proven difficult to define, see 2 Hickman & Pierce, Administrative Law Treatise (6th ed), § 10.4, p 1136, I am unaware of any authority that draws those lines in a manner that prohibits any review of the evidentiary record.

In order to determine whether an agency's final decision and findings were arbitrary and capricious, the reviewing court must conduct a minimum level of review of the evidentiary record in order to ensure that there is *some* evidentiary support for that decision. For example, a reviewing court could not determine whether a decision has been made upon unlawful procedures without reviewing what procedures had been

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[1] While the Civil Service Commission originally argued to this Court that the *Brandon* test exceeds the original intent of the constitutional text of Const 1963, art 6, § 28, it affirmatively abandoned that position at oral argument.

used. Likewise, a reviewing court could not determine whether a decision lacked an adequate determining principle without reviewing the reasoning behind the decision. While a reviewing court lacks authority to reweigh the evidence considered by an agency and cannot second-guess an agency's view of the facts or an agency's application of the correct legal standard to those facts, a reviewing court must review the evidentiary record in order to determine there was not a *complete lack* of evidentiary support for an agency's decision and in order to ascertain the determining principle applied by the agency.

The circuit court did not err in scope by reviewing the evidentiary record. It was required to do so to determine whether the Civil Service Commission's decision was authorized by law. Rather, the circuit court erred in manner by failing to afford the Civil Service Commission proper deference. Because I believe the errors identified by the Court of Appeals discussed manner rather than scope, I concur in the Court's decision to deny leave to appeal.

MCCORMACK, C.J., joins the statement of CAVANAGH, J.

BERNSTEIN, J., would remand this case to the Court of Appeals to apply the standard set forth in *Brandon Sch Dist v Mich Educ Special Services Ass'n*, 191 Mich App 257 (1991).

In re RJ FISCHER, MINOR, No. 159114; Court of Appeals No. 344042.

Master Appointed March 18, 2019:

IN THE MATTER OF BYRON J KONSCHUH, JUDGE 40TH CIRCUIT COURT BEFORE THE JUDICIAL TENURE COMMISSION, No. 159088. On order of the Court, the request by the Judicial Tenure Commission for the appointment of a Master is considered, and the Honorable William J. Caprathe is hereby appointed Master to hear Formal Complaint No. 100.

Summary Disposition March 20, 2019:

PEOPLE V CHARLES WOOD, No. 156688; reported below: 321 Mich App 415. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we remand this case to the Oakland Circuit Court for further proceedings. The warrantless search of the defendant's vehicle was properly executed pursuant to the automobile exception. Based on the defendant's admission of criminal activity and the presence of nitrous oxide canisters in the Trooper's plain view, the Trooper had probable cause to believe that the defendant had committed a crime and that evidence of that crime was located within the vehicle. See *People v Kazmierczak*, 461 Mich 411, 418-419 (2000).

In re ATTORNEY FEES OF MITCHELL T FOSTER, No. 157509; Court of Appeals No. 334309. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. The Oakland Circuit Court abused its discretion by denying Foster's request for any extraordinary fees for time spent consulting

with defense expert Gerald Gabriel. Although the defendant ultimately pled no contest and it is not clear how beneficial Gabriel's consultation was to the defense, it was outside the range of principled outcomes for the trial court to deny reimbursement altogether for time Foster spent consulting with Gabriel. As dissenting Judge GLEICHER observed, "Foster was obligated to review more than 2,000 pages of financial data and the preliminary examination testimony given by the prosecution's expert," a record that is "outside the realm of most criminal prosecutions." And the trial judge granted the defense $12,500 specifically for the purpose of Foster being able to consult with Gabriel. We remand this case to the Oakland Circuit Court for further proceedings on extraordinary fees in light of this order. In all other respects, leave to appeal is denied.

PEOPLE v KELSEY, No. 157940; Court of Appeals No. 329229. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse Section XI of the judgment of the Court of Appeals, and we remand this case to the Ingham Circuit Court to conduct a restitution hearing. The defendant raised a timely objection to the amount of restitution requested by the prosecution and made a timely request for a restitution hearing to resolve that dispute. See MCL 780.767(4). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

CROWLEY v MICHIGAN REALTY SOLUTIONS, No. 158010; Court of Appeals No. 341722. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

VIVIANO, J., would deny leave to appeal.

PEOPLE v JAMES CLARK, No. 158224; Court of Appeals No. 343911. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Arnold (On Remand)* (Court of Appeals Docket No. 325407). After *Arnold* is decided, the Court of Appeals shall determine whether its *Arnold* opinion controls in this case and, if it does, reconsider this case in light of *Arnold*. We do not retain jurisdiction.

PEOPLE v DEBRUYNE, No. 158981; Court of Appeals No. 346534. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

We further order that trial court proceedings in the Jackson Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Leave to Appeal Granted March 20, 2019:

PROGRESS MICHIGAN v ATTORNEY GENERAL, Nos. 158150 and 158151; reported below: 324 Mich App 659. The parties shall address: (1) whether

there is a sovereign or governmental immunity defense to the failure to disclose public records pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq*.; (2) if so, whether that immunity is waived by the FOIA; (3) whether the notice and verification requirements of the Court of Claims Act, see MCL 600.6431(1), are applicable to a FOIA appeal; (4) if so, whether the Court of Appeals erred when it held that the plaintiff's failure to follow the verification requirement in its original complaint, which was filed within one year after the FOIA claim accrued, MCL 600.6431(1), rendered the complaint "invalid from its inception" and incapable of amendment; and (5) whether the Court of Appeals erred when it held that the verified amended complaint, also filed within the one-year period, could not "relate back" to the date of the original complaint for purposes of compliance with the 180-day limitations period of the FOIA.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 20, 2019:

CHAPMAN v MACK, No. 158169; Court of Appeals No. 335678. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the appellant's gross negligence claim should have been dismissed for failure to state a claim upon which relief could be granted, MCR 2.116(C)(8); and (2) whether the appellant's intentional tort claims were barred by governmental immunity because there was no genuine issue of material fact regarding whether the appellee acted in good faith and without malice. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied March 20, 2019:

PEOPLE v EDDIE GARRETT, No. 158085; Court of Appeals No. 343348.

PEOPLE v MCCRAY, No. 158129; Court of Appeals No. 342927.

Reconsideration Denied March 20, 2019:

SEJASMI INDUSTRIES, INC v A+ MOLD, INC, No. 156341; Court of Appeals No. 336205. Leave to appeal denied at 503 Mich 922.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

Application for Leave to Appeal Dismissed March 20, 2019:

In re CHURCHILL/BELINKI, MINORS, No. 157991; Court of Appeals No. 337790. By order of November 16, 2018, this Court directed the Clerk to schedule oral argument on the application relating to the minor child, OTC. This Court also reversed the March 15, 2018 Court of Appeals judgment in part and vacated the Clare Circuit Court's February 17, 2017 order of adjudication and March 15, 2017 order of disposition as they pertained to the minor children SLB and JWC. In lieu of oral argument on the application, the parties have now filed a joint motion to vacate the circuit court's orders of adjudication and disposition and the Court of Appeals judgment as to the minor child, OTC, and to remand this case to the circuit court with instructions to dismiss without prejudice the petition against the respondent as to all three children.

On order of the Court, the motion is granted. We vacate those parts of the March 15, 2018 Court of Appeals judgment and the Clare Circuit Court's orders of adjudication and disposition pertaining to the minor child, OTC, and we remand this case to the Clare Circuit Court, which shall dismiss without prejudice the petition against the respondent as to all three children.

The application for leave to appeal as it pertains to the minor child, OTC, is dismissed with prejudice and without costs. We do not retain jurisdiction.

Summary Disposition March 22, 2019:

PEOPLE V JOEL DAVIS, No. 156406; reported below: 320 Mich App 484. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we vacate in part the July 13, 2017 judgment of the Court of Appeals. On appeal to the Court of Appeals, defendant argued that his convictions for both assault with intent to do great bodily harm (AWIGBH), MCL 750.84(1)(a),[1] and aggravated domestic assault, MCL 750.81a(3),[2] violated his right to be free from multiple punishments under double-jeopardy principles. US Const, Am V; Const 1963, art 1, § 15. The Court of Appeals reframed this double-jeopardy argument as an issue of "mutually exclusive" verdicts, specifically a situation "where a guilty verdict on one count necessarily excludes a finding of guilt on another . . . ." *People v Davis*, 320 Mich App 484, 493 (2017), quoting *United States v Randolph*, 794 F3d 602, 610-611 (CA 6, 2015) (quotation marks omitted). See also *United States v Powell*, 469 US 57, 69 n 8

[1] To be found guilty of AWIGBH, a person must "[a]ssault[] another person with intent to do great bodily harm, less than the crime of murder." MCL 750.84(1)(a).

[2] To be found guilty of aggravated domestic assault, a person must, *inter alia*, assault an individual "without intending . . . to inflict great bodily harm . . . ." MCL 750.81a(2).

(1984). The Court of Appeals noted that the statutory language of AWIGBH requires a defendant to commit assault *with* the specific intent to do great bodily harm, whereas the statutory language of aggravated domestic assault requires a defendant to commit assault *without* the intent to commit great bodily harm. *Davis*, 320 Mich App at 490. The Court of Appeals reasoned that these contradictory provisions rendered the verdicts mutually exclusive and, on that basis, vacated defendant's aggravated domestic assault conviction. *Id*. at 496. In doing so, the Court of Appeals erred.

Regardless of whether this state's jurisprudence recognizes the principle of mutually exclusive verdicts, this case does not present that issue. In this case, the jury was instructed that to convict defendant of AWIGBH, it must find that defendant acted "with intent to do great bodily harm, less than the crime of murder." See MCL 750.84(1)(a). However, with respect to aggravated domestic assault, the jury was *not* instructed that it must find that defendant acted *without* the intent to inflict great bodily harm. See MCL 750.81a(3); *People v Doss*, 406 Mich 90, 99 (1979) ("While the absence of malice is fundamental to manslaughter in a general definitional sense, it is not an actual element of the crime itself which the people must establish beyond a reasonable doubt."). Since, with respect to the aggravated domestic assault conviction, the jury never found that defendant acted without the intent to inflict great bodily harm, a guilty verdict for that offense was not mutually exclusive to defendant's guilty verdict for AWIGBH, where the jury affirmatively found that defendant acted with intent to do great bodily harm. Thus, the Court of Appeals erred by relying on the principle of mutually exclusive verdicts to vacate defendant's aggravated domestic assault conviction. We thus vacate that part of the Court of Appeals judgment relevant to that finding.

Because the Court of Appeals erroneously decided this case on the basis of mutually exclusive verdicts, the Court did not address the merits of defendant's double-jeopardy argument. *Davis*, 320 Mich App at 489 (finding that "double jeopardy is not the proper initial focus"). Accordingly, we remand this case to the Court of Appeals for reconsideration of the parties' arguments in light of *People v Miller*, 498 Mich 13 (2015). We also direct the Court of Appeals to determine and apply the appropriate standard of review to this double-jeopardy challenge because the applicable standard of review was not explicitly addressed by the Court of Appeals in its July 13, 2017 judgment. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 22, 2019:

In re IM LONG, MINOR, No. 158854; reported below: 326 Mich App 455. The petitioner-appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the Court of Appeals clearly erred in reversing the trial court's decision to exercise jurisdiction over the minor child pursuant to MCL 712A.2(b)(2), where the child was living with a guardian and there was no evidence that the

guardian's home was unfit, yet there was evidence that the respondent-father is incarcerated and had a history of criminal conduct; (2) whether the Court of Appeals clearly erred in reversing the trial court's additional decision to exercise jurisdiction over the minor child pursuant to MCL 712A.2(b)(6), based on the respondent-father's conduct in the two years preceding the filing of the petition when he was a putative, not legal, father; and (3) whether the trial court's reliance on *In re LE*, 278 Mich App 1 (2008), was misplaced. In addition to the brief, the petitioner-appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The respondent-appellee shall file a supplemental brief within 21 days of being served with the petitioner-appellant's brief. The respondent-appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the petitioner-appellant. The lawyer-guardian ad litem for the minor child is invited to file a supplemental brief within 21 days of being served with the petitioner-appellant's brief. A reply, if any, must be filed by the petitioner-appellant within 14 days of being served with the respondent-appellee's brief. The parties should not submit mere restatements of their application papers.

The Children's Law and Family Law Sections of the State Bar of Michigan, the UDM Juvenile Appellate Practice Clinic, and the University of Michigan Law School Child Advocacy Law Clinic are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 22, 2019:

PEOPLE v JOEL DAVIS, No. 156445; reported below: 320 Mich App 484. By order of May 4, 2018, the application for leave to appeal the July 13, 2017 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Davis* (Docket No. 156406) and *People v Price* (Docket No. 156180).

On order of the Court, we vacate that part of our May 4, 2018 order that held this application in abeyance for *People v Price* (Docket No. 156180). *People v Davis* (Docket No. 156406) having been decided on March 22, 2019, 503 Mich 984 (2019), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

In re RN TANKERSLEY, MINOR, No. 159126; Court of Appeals No. 342730.

Summary Disposition March 27, 2019:

UNIVERSITY OF MICHIGAN REGENTS v VICTOR P VALENTINO, JD, PC, No. 158052; Court of Appeals No. 339198. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment.

The Court of Appeals found this Court's decision in *Covenant Med Ctr, Inc v State Farm*, 500 Mich 191 (2017), "dispositive." *Covenant* held that a healthcare provider possesses no statutory cause of action against an insurer for recovery of PIP benefits. Plaintiff is a healthcare provider. But the plaintiff is not seeking payment from an insurance provider for no-fault benefits under a statutory no-fault theory. Rather, the plaintiff's complaint alleges a common-law tort—conversion—against the defendant, an attorney, based on the defendant's retention of one-third of the funds from a check that was made payable directly to *both* plaintiff and defendant. Although a healthcare provider has no statutory cause of action against an insurer to compel payment under the no-fault act, the act permits insurers to directly pay healthcare providers on the injured person's behalf. MCL 500.3112. The insurer did so here. "[I]f an instrument is payable to 2 or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced *only by all of them*." MCL 440.3110(4) (emphasis added). Thus, the plaintiff, as joint payee, had a right to control the funds. *Covenant* is not dispositive on the question presented here. We remand this case to the Washtenaw Circuit Court for further proceedings not inconsistent with this order.

BERNSTEIN, J., did not participate due to a familial relationship.

PEOPLE v SNOVER, No. 158111; Court of Appeals No. 343930. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Granted March 27, 2019:

TOMRA OF NORTH AMERICA, INC v DEPARTMENT OF TREASURY, Nos. 158333 and 158335; reported below: 325 Mich App 285. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Persons or groups interested in the determination of the issue presented in this matter may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Tomra of North America, Inc v Department of Treasury* (Docket No. 158333) only.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered March 27, 2019:

PEOPLE v WANG, No. 158013; Court of Appeals No. 336673. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the statutory exception in MCL 333.16294 is an element of the offense for which the prosecutor has the burden of proof, see *People v Rios*, 386 Mich 172 (1971); but see *People v Langlois*, 325 Mich App 236 (2018); (2) if the statutory exception is an element of the offense, whether the Court of Appeals erred in holding that the evidence was sufficient to sustain the defendant's conviction under MCL 333.16294 and specifically, whether the Court of Appeals

erred in concluding that the defendant's actions were consistent with the practice of medicine and therefore could not be delegated to her under MCL 333.16215; and (3) if the statutory exception is not an element of the offense, whether defense counsel was ineffective for failing to raise a delegation defense and bring the relevant statutory provisions to the trial court's attention. In addition, the appellant shall address whether the evidence was sufficient to sustain the defendant's convictions under MCL 400.607(1), and specifically whether the evidence was sufficient to show that the defendant was in possession of facts under which she was aware or should have been aware that her conduct was substantially certain to cause the payment of a Medicaid benefit. See MCL 400.602(f).

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan, the Criminal Defense Attorneys of Michigan, the Michigan Health & Hospital Association, the Michigan Osteopathic Association, and the Michigan State Medical Society are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v KELLY WARREN, No. 158065; Court of Appeals No. 333997. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether, when a defendant's plea of guilty or no contest will subject him to the court's discretion to impose consecutive sentences, the court must advise the defendant of that possibility before the court may accept the plea. See US Const, Am XIV; Const 1963, art 1, § 17; MCR 6.302(B). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 27, 2019:

PEOPLE v SARACHICK, No. 157974; Court of Appeals No. 332859. The denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR Subchapter 6.500 that may include the issue of whether the defendant asserted his right to self-representation knowingly, intelligently, and voluntarily.

ALTICOR, INC v DEPARTMENT OF TREASURY and ACCESS BUSINESS GROUP LLC v DEPARTMENT OF TREASURY, Nos. 158035 and 158036; reported below: 324 Mich App 403.

OLD ORCHARD BRANDS LLC v DEPARTMENT OF TREASURY, No. 158040; reported below: 324 Mich App 403.

PEOPLE v BODMAN, No. 158244; Court of Appeals No. 338333.

OAKLAND COUNTY v STATE OF MICHIGAN, No. 158315; reported below: 325 Mich App 247.

PEOPLE v JIMARIO SULLIVAN, No. 158444; Court of Appeals No. 343823.

Reconsideration Denied March 27, 2019:

HARRIS v OAKWOOD HEALTHCARE, INC, No. 157092; Court of Appeals No. 333389. Leave to appeal denied at 503 Mich 871.

PEOPLE v MARSHALL, No. 157831; Court of Appeals No. 341647. Leave to appeal denied at 503 Mich 887.

CAVANAGH, J. (*concurring*). I concur in the denial of the motion for reconsideration of this Court's October 30, 2018 order because I agree that reconsideration of our previous order is not warranted. I write separately to note that the motion for reconsideration raised new issues that are not properly before this Court, and this denial does not prejudice the defendant's ability to raise those issues in a motion for relief from judgment pursuant to Subchapter 6.500 of the Michigan Court Rules.

Summary Disposition March 29, 2019:

PEOPLE v RODNEY HALL, No. 155989; Court of Appeals No. 330503. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing the scoring of Offense Variable 19 (OV 19), MCL 777.49 (interference with the administration of justice), and we remand this case to the Lenawee Circuit Court for the resentencing ordered by the Court of Appeals. On remand, the circuit court shall not assign 10 points for OV 19 without specifically articulating the basis for the assignment of any points. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v CRAWFORD, No. 158236; Court of Appeals No. 330215. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion holding that evidence of the 2011 robbery served the proper purpose of showing intent, MRE 404(b)(1). *People v Denson*, 500 Mich 385 (2017). We affirm, however, the Court of Appeals holding that any error in this regard was harmless in light of the overwhelming untainted evidence.

MARKMAN, J. (*concurring*). I agree with the majority that any error that might have occurred here was harmless and therefore reach the same result. However, for precisely the reason of this harmlessness, I believe it is unnecessary to address whether the Court of Appeals erred in holding that evidence of defendant's previous criminal conduct was admissible under MRE 404(b). Such error is clearly implied by reference to *People v Denson*, 500 Mich 385 (2017), a decision of this Court in which there was both a 404(b) violation and the *absence* of harmless error.

In re BULLEY/MAY, MINORS, No. 158836; Court of Appeals No. 342837. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment pertaining to respondent-mother, and we remand this case to that court for further consideration.

On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Wayne Circuit Court Family Division for that court to reconsider its November 6, 2017 order finding jurisdiction and its February 7, 2018 order terminating respondent-mother's parental rights to JMM and AIDB. The circuit court shall be directed to specifically address: (1) whether there is sufficient evidence that respondent-mother either engaged in the abuse of PES or failed to protect PES from the abuse, resulting in a reasonable likelihood that JMM and AIDB would suffer harm, injury, or abuse in the foreseeable future if placed in respondent-mother's home, taking into consideration, among other evidence, whether respondent-mother was attentive to PES's medical needs by taking PES to five doctor appointments during the approximate five-week period PES was in her care; the significance of evidence that medical professionals did not observe signs of physical abuse on PES during the child's medical appointments; testimony that respondent-mother was not told by PES's father that he twice dropped PES; and whether respondent-mother knew the cause of the non-accidental trauma inflicted on PES and attempted to conceal it, see *In re Ellis*, 294 Mich App 30, 32-36 (2011), and (2) whether termination is in JMM's and AIDB's best interests, taking into consideration, among other evidence, the lack of evidence of domestic violence, abuse, or CPS involvement with respect to JMM and AIDB; the children's bond to respondent-mother; evidence of suitable housing, income, and family support; respondent-mother's visitation with JMM and AIDB; respondent-mother's January 15, 2019 divorce from PES's father; and whether respondent-mother would benefit from a case service plan. The circuit court may, in its discretion, receive proofs or hold an evidentiary hearing. The circuit court shall be directed to forward to the Court of Appeals a written opinion addressing the above issues within

42 days of the Court of Appeals remand order. The Court of Appeals is directed to expedite its consideration and resolution of this case. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 29, 2019:

PEOPLE v TOWNE, No. 157210; Court of Appeals No. 322820. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the police exceeded the proper scope of a knock and talk when they approached and secured the defendant's home at night while attempting to execute an arrest warrant for the defendant's son, who lived elsewhere, see *People v Frederick*, 500 Mich 228 (2017); (2) whether the police had sufficient grounds to believe that the subject of the arrest warrant was inside the defendant's home; (3) the appropriate standard to be used by a reviewing court to determine whether the police are permitted to enter a third-party's home or curtilage to execute an arrest warrant, see *Steagald v United States*, 451 US 204 (1981); *United States v Pruitt*, 458 F3d 477 (CA 6, 2006); *United States v Hardin*, 539 F3d 404 (CA 6, 2008); (4) if the proper scope of a knock and talk was not exceeded in this case, whether the plain view or exigent circumstances exceptions to the warrant requirement permitted the police to forcibly enter the defendant's home based on an officer's perceptions while posted at the rear of the home in the curtilage or in an "open field"; and (5) whether the exclusionary rule should apply under these circumstances.

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 29, 2019:

STACKER v LAUTREC, LTD, No. 155120; Court of Appeals No. 328191. On November 19, 2018, the Court heard oral argument on the application for leave to appeal the October 27, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied.

VIVIANO, J. (*concurring*). I concur in the Court's order denying leave to appeal. I agree that, under *Allison v AEW Capital Mgt, LLP*, 481 Mich 419 (2008), plaintiff has presented sufficient evidence to survive summary disposition. I write separately because I believe that *Allison*'s holding that MCL 554.139(1)(a) creates an ongoing obligation on the part of the lessor may be premised on an erroneous assumption and should be reexamined. But, since this argument has not been raised by any party, I write only to highlight the issue for future consideration.

Plaintiff Mae Hendrix[1] slipped and fell on an ice patch that formed when water from a garage downspout pooled and froze on the driveway leading to her garage entrance at the apartment complex where she resided. The parties agree that all of the apartment driveways together constitute a common area, as tenants routinely walked across the adjoining driveways to access their own apartments. Plaintiff sued defendant, the owner of the apartment complex, claiming negligence, common-law premises liability, and a violation of MCL 554.139(1)(a).

MCL 554.139 provides, in relevant part, as follows:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenant[']s wilful or irresponsible conduct or lack of conduct.

This statute was enacted in 1968 to codify the common-law implied warranty of habitability.[2] In *Allison*, this Court held that "[b]ecause a parking lot within a leased residential property is a common area under MCL 554.139(1)(a), the lessor effectively has a contractual duty *to keep* the parking lot 'fit for the use intended by the parties.' "[3] For the reasons below, I question whether this interpretation comports with the plain language of Subsection (1)(a), which does not appear to create an ongoing obligation on the part of lessors.

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[1] Mae Hendrix passed away on May 11, 2017, and the trial court entered an order on December 15, 2017, allowing the personal representative of her estate, Celestine Stacker, to substitute as plaintiff. For ease of reference, I will continue to refer to Ms. Hendrix as "plaintiff."

[2] 1968 PA 295. See *Allison*, 481 Mich at 441 (CORRIGAN, J., concurring) ("A reasonable inference arises from the language of MCL 554.139(1)(a) ('fit for the use intended by the parties') that it codifies the implied warranty of habitability.").

[3] *Id*. at 429 (emphasis added).

Our primary goal in interpreting a statute "is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute."[4] When the statutory language is clear, "we presume that the Legislature intended the meaning expressed."[5] The plain language of MCL 554.139 creates two covenants in all residential leases: (1) "[t]hat the premises and all common areas are fit for the use intended by the parties," MCL 554.139(1)(a); and (2) that the landlord will "keep the premises in reasonable repair during the term of the lease" and "comply with the applicable health and safety laws," MCL 554.139(1)(b). The first of these covenants uses the present tense of the verb "to be"—"are"—which strongly suggests that the covenant relates to the condition of the premises at the time the covenant is made, i.e., at the time the lease is executed. In other words, it does not appear that this covenant creates an ongoing obligation for the duration of the lease term. By contrast, the second covenant creates such an ongoing obligation by requiring that the landlord "*keep* the premises in reasonable repair during the term of the lease or license."[6] The word "keep" is relevantly defined as "to maintain, or cause to stay or continue, in a specified condition, position, etc.; as, *keep* your engine running."[7] This duty obviously extends beyond the inception of the lease and continues during the lease term.[8]

I concur in the majority's denial order because, under *Allison*, which interpreted the covenant created by MCL 554.139(1)(a) as an ongoing obligation, I agree that there remains a genuine issue of material fact as to whether defendant violated that covenant by failing to keep the driveway "fit for the use intended by the parties." As the Court of Appeals explained, photographs taken from the day of plaintiff's fall show that a "substantial portion" of the driveway was covered in ice formed when water from a downspout pooled in broken and depressed concrete. But, for the reasons above, I believe this Court should reconsider in an appropriate future case whether *Allison*'s interpreta-

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[4] *Id*. at 427 (quotation marks and citation omitted).

[5] *Id*.

[6] MCL 554.139(1)(b) (emphasis added).

[7] *Webster's New Twentieth Century Dictionary of the English Language, Unabridged* (2d ed).

[8] See also Schier, *Draftsman: Formulation of Policy*, 2 Prospectus 227, 233 (1968) (emphasis added) ("Under [MCL 554.139,] the occupant of rented housing, whether a lessee or a licensee, has the benefit of two covenants which will be found in every rental agreement. The first covenant is in effect a warranty that the premises *are fit* for the uses intended by the parties *at the time of taking possession*. The second is in effect a *promise of future performance* and states that the lessor or licensor covenants to keep the premises in reasonable repair during the term of occupancy and to comply with all applicable health and safety laws.").

tion of MCL 554.139(1)(a) as creating an ongoing obligation is consistent with the plain language of the statute.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. Instead, I agree with Judge O'BRIEN's partial dissent that this case is materially indistinguishable from the circumstances set forth in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419 (2008), and thus would reverse on the basis of that decision.[1]

Plaintiff lived in an apartment complex that has side-by-side driveways with connected garages. The driveways connect the public road to each tenant's garage, and the garages open to their driveways and have rear-entry doors to a walkway that connects to the residential units. At the end of the row of garages, the driveways merge into an outdoor sidewalk that also leads to the residential units. Plaintiff and her husband parked their vehicle in front of their garage, which was the second garage to the right of the end of the row. Plaintiff collected groceries from the trunk of the vehicle and began to walk across the adjoining driveway toward the outdoor sidewalk, but as she walked, she slipped and fell on ice. The ice had allegedly unnaturally accumulated between the driveway closest to the sidewalk and plaintiff's driveway because of pooling from a downspout into an area of depressed and broken pavement. The rest of the driveway contained only small patches of snow. Tenants routinely walked across neighboring driveways to reach their residential units, rather than walking through the garage and exiting through the rear-entry doors.

Plaintiff brought a claim against defendant, the apartment owner, seeking damages on the basis that defendant had violated the duty to keep the premises fit under MCL 554.139(1)(a). The trial court granted defendant's motion for summary disposition on the claim, but the Court of Appeals in a split decision reversed, concluding that genuine issues of material fact precluded summary disposition. *Hendrix v Lautrec, Ltd*, unpublished per curiam opinion of the Court of Appeals, issued October 27, 2016 (Docket No. 328191), p 4. This Court then ordered oral argument on the application. *Stacker v Lautrec*, 501 Mich 1085 (2018).

The issue here concerns whether there is a genuine issue of material fact that defendant breached MCL 554.139(1)(a), which provides:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:

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[1] As Justice VIVIANO recognizes, neither party asks this Court to reexamine our decision in *Allison*. Moreover, because the driveway here was "fit for the use intended by the parties" under MCL 554.139(1)(a) when the injury occurred, it is unnecessary to assess whether *Allison* correctly interpreted that provision as imposing an ongoing obligation upon the lessor. However, even if Justice VIVIANO's suggested interpretation of the statute were correct, I would still reverse, as plaintiff has not demonstrated that the driveway was unfit when the lease was executed.

> (a) That the premises and all common areas are *fit for the use* intended by the parties. [Emphasis added.]

In *Allison*, this Court addressed a lessor's duty under MCL 554.139(1)(a) with regard to 1 to 2 inches of snow and ice covering the parking lot of an apartment complex. We observed that "a parking lot is constructed for the primary purpose of storing vehicles on the lot" and therefore a lessor has a duty under MCL 554.139(1)(a) to keep the lot fit for the parking of vehicles. *Allison*, 481 Mich at 429. This Court also "recognize[d] that tenants must walk across a parking lot in order to access their vehicles," but held that

> plaintiff did not show that the condition of the parking lot in this case precluded access to his vehicle. The Court of Appeals erred in concluding that, under the facts presented, the parking lot in this case was unfit simply because it was covered in snow and ice. [*Id*. at 430-431.]

This Court further explained that

> [t]here are conceivable circumstances in which a lessor may have a duty to remove snow and ice under MCL 554.139(1)(a), such as when the accumulation is so substantial that tenants cannot park or access their vehicles in a parking lot. As we have already observed, such circumstances were not present in this case. [*Id*. at 438.]

The Court of Appeals majority distinguished the instant case from *Allison* on the basis that

> a driveway is not a parking lot. Unlike a parking lot, the connected driveways in this case are not used primarily for parking in practice; they are also intended for pedestrian access to the garages and pedestrian access to the residential units. In these senses, the driveways are more akin to sidewalks. [*Hendrix*, unpub op at 4.]

However, as correctly noted by Judge O'BRIEN in dissent, the parking lot in *Allison* was also "intended for pedestrian access to" the parking lot and the residential units. *Id*. at 1 (O'BRIEN, J., concurring in part and dissenting in part). Indeed, *Allison* explicitly recognized that "tenants must walk across a parking lot in order to access their vehicles," *Allison*, 481 Mich at 430, and thus concluded that a parking lot must also provide "reasonable access to [the tenants'] parked vehicles," *id*. at 429. In other words, *Allison* concluded that a parking lot must be "fit" for *both* parking vehicles *and* walking between the vehicles and the residential units. We then explained that the parking lot in that case was "fit" for walking between the vehicles and the residential units if it provided tenants "reasonable access" to each of those areas. *Id*. Similarly, the driveways at issue here are intended for the parking of vehicles, and as part of that intended use they must also be "fit" for

walking between the vehicles and the residential units. Accordingly, as in *Allison*, the lessor had a similar duty to ensure "reasonable access" to both the parked vehicles and the residential units.

Assuming *arguendo* that the Court of Appeals majority correctly concluded that, unlike the parking lot in *Allison*, the driveways at issue "are not used primarily for parking in practice," *Hendrix*, unpub op at 4, this purported distinction does not alter the relevant legal inquiry. The statute does not alter a lessor's duty of "fitness" on the basis of whether an intended use of an area is *primary* or not. Rather, as in *Allison*, the driveways here were intended for *both* parking vehicles *and* walking between those vehicles and the residential units and as a result had to provide "reasonable access" to those areas. Thus, *Allison* precisely governs the determination of whether defendant violated MCL 554.139(1)(a) in this case, without regard to whether the driveways were "used primarily for parking in practice."

The ice on the driveway did not deprive plaintiff of "reasonable access" to her vehicle or residential unit. As *Allison* again explained:

> While a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more exigent circumstances than those obtaining in in this case. The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit . . . . Mere inconvenience of access . . . will not defeat the characterization of a lot as being fit for its intended purposes. [*Id*. at 430.]

The ice on the driveway did not "preclude" plaintiff from accessing either her vehicle or her residential unit. *Id*. The ice did not extend across the width of the driveway and therefore could have been avoided. Thus, the accumulation here was, in fact, less "exigent" than in *Allison*, in which the entire lot was covered with ice and snow. Plaintiff notes, however, that, unlike the conditions in *Allison*, the ice on the driveway here was arguably created unnaturally by the formation of ice that resulted from pooling from a downspout into an area of depressed and broken pavement on the driveway. However, the lessor's duty under MCL 554.139(1)(a) relates to the *condition* of the area and does not change depending on whether an icy condition has been created by natural or unnatural causes. So long as the area itself is "fit for the use intended by the parties," there is no liability under MCL 554.139(1)(a). Because the driveways here, in my judgment, were entirely "fit" for the use of parking a vehicle and provided "reasonable access" to vehicles and residential units, plaintiff is not entitled to relief. Accordingly, I would reverse.[2]

ZAHRA, J., joins the statement of MARKMAN, J.

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[2] Plaintiff here also sought damages on the basis of common-law premises liability. The trial court granted defendant's motion for sum-

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

BOLER v GOVERNOR, No. 158147; reported below: 324 Mich App 614.

ZAHRA, J. (*concurring*). I concur in the Court's denial of leave to appeal in this case, but write separately to address and clarify amicus curiae's concerns.

This Court granted the motion of the Great Lakes Water Authority, the Detroit Water and Sewerage Department, and the Oakland County Water Resources Commissioner to participate as amici curiae. They are entities that treat and provide drinking water for a vast portion of communities in this state and that rely on the status of such services as a "governmental function" to afford them governmental immunity from tort liability under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., specifically under § 1407.

In this case, the Court of Appeals held that, for purposes of Court of Claims jurisdiction: (1) "a municipality is not an arm of the state when it operates a waterworks plant," and (2) a municipality and its employees operating under emergency management pursuant to the Local Financial Stability and Choice Act, MCL 141.1541 *et seq*., are similarly not arms of the state. *Boler v Governor*, 324 Mich App 614, 619 (2018); see MCL 600.6419(1)(a) (vesting the Court of Claims with exclusive jurisdiction "[t]o hear and determine any claim . . . against the state or any of its departments or officers") and MCL 600.6419(7) (providing that " 'the state or any of its departments or officers' " includes an "arm, or agency of this state").

Amici's narrow interest in this case pertains not directly to the Court of Appeals' holdings, but to statements in its decision that tend to characterize the operation and maintenance of municipal waterworks generally as proprietary rather than governmental functions. See, e.g., *Boler*, 324 Mich App at 624 (stating that "[t]he operation and maintenance of waterworks is generally found to be a proprietary or private function of a municipality as opposed to a governmental function"). Accordingly, amici have requested that this Court expressly reject any portions of the Court of Appeals opinion that might support the proposition that the operation of a municipal waterworks is not a governmental function, because those statements could have adverse effects on amici.

The Court of Appeals opinion does not address whether operating a water supply and distribution system is a governmental or proprietary function for purposes of the GTLA. In fact, the Court of Appeals decision only mentions the GTLA once, in discussing potential consequences of reaching a contrary holding—i.e., if it had determined that whenever a state employee assists in the management of a private entity, and that entity then becomes an arm of the state, the state may be subject to liabilities never contemplated in the GTLA. *Id*. at 630. Amici's concerns

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mary disposition on that claim, and the Court of Appeals affirmed. Plaintiff did not appeal the Court of Appeals' resolution of this issue and thus it is not before this Court.

are noted, but because the Court of Appeals decision in this case does not directly affect whether the operation and maintenance of a municipal waterworks is an "exercise or discharge of a governmental function" under MCL 691.1407(1) and (2)(b), there is no basis for this Court to vacate any portion of the Court of Appeals decision suggesting otherwise.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

PEOPLE v STEVENS, No. 158369; Court of Appeals No. 342643.

In re PL BRYANT, MINOR, No. 159136; Court of Appeals No. 343535.

Reconsideration Denied March 29, 2019:

PEOPLE v MICHAEL GARRETT, No. 157544; Court of Appeals No. 341352. Leave to appeal denied at 503 Mich 860.

Summary Disposition April 2, 2019:

PEOPLE v HAAN, No. 158767; Court of Appeals No. 345022. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether, in light of *People v Lewis*, 503 Mich 162, it was plain error for the trial court to order the defendant to pay an assessment of court-appointed attorney fees, pursuant to MCL 769.1k(1)(b)(*iv*), without first making findings of fact in support of the assessment. In all other respects, leave to appeal is denied.

Leave to Appeal Denied April 2, 2019:

PEOPLE v WADE-BEY, No. 157349; Court of Appeals No. 335045.

ATTORNEY GENERAL BILL SCHUETTE *ex rel* DEPARTMENT OF HEALTH AND HUMAN SERVICES v HALL, No. 157742; Court of Appeals No. 340315.

PEOPLE v RONALD ANDERSON, No. 157759; Court of Appeals No. 340760.

PEOPLE v THORNHILL, No. 157902; Court of Appeals No. 341403.

VIVIANO, J., not participating due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v HURT, No. 157917; Court of Appeals No. 342120.

GREEN v REETHS-PUFFER PUBLIC SCHOOLS, No. 158012; Court of Appeals No. 340889.

PEOPLE v STEPHEN WILSON, No. 158134; Court of Appeals No. 336796.

PEOPLE v DENGEL, No. 158155; Court of Appeals No. 341341.

PEOPLE v REGAN REYNOLDS, No. 158188; Court of Appeals No. 342207.

PEOPLE v MEASE, No. 158245; Court of Appeals No. 341736.

PEOPLE v CARON ADAMS, No. 158280; Court of Appeals No. 343412.

SOULARD v REPUBLIC PARKING SYSTEM, INC, No. 158334; Court of Appeals No. 337381.

PEOPLE v CORNELL, No. 158359; Court of Appeals No. 343889.

ATTORNEY GENERAL v POLYONE CORPORATION, No. 158360; Court of Appeals No. 339754.

In re RICHARD LIBA REVOCABLE LIVING TRUST, No. 158370; Court of Appeals No. 338049.

CORMIER v PF FITNESS-MIDLAND, LLC, No. 158372; Court of Appeals No. 331286.

DUNKEL v SIGNAL MEDICAL CORPORATION, No. 158377; Court of Appeals No. 339357.

MCGRATH v MEEMIC INSURANCE COMPANY, No. 158393; Court of Appeals No. 343011.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE v DAMON HOUSTON, No. 158410; Court of Appeals No. 334744.

PEOPLE v DANYELL THOMAS, No. 158411; Court of Appeals No. 343839.

PEOPLE v RAPER, No. 158417; Court of Appeals No. 343978.

TOWNES v SOLIS-VELASQUEZ, No. 158426; Court of Appeals No. 342360.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE v VANDURMEN, No. 158431; Court of Appeals No. 342116.

MCGRATH v MEEMIC INSURANCE COMPANY, No. 158432; Court of Appeals No. 343254.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

CONSTANT v HAMMOND, CONSTANT v DTE ELECTRIC COMPANY, and CONSTANT v PRINCE, Nos. 158457, 158458, 158459, 158460, and 158461; Court of Appeals Nos. 336489, 336620, 337483, 338455, and 338686.

PEOPLE v ALFORD, No. 158472; Court of Appeals No. 342223.

PEOPLE v CORA-ROSARIO, No. 158482; Court of Appeals No. 344824.

PEOPLE v WARDELL, No. 158484; Court of Appeals No. 339569.

PEOPLE v RAGAN, No. 158491; Court of Appeals No. 343933.

PEOPLE v BIRKENSHAW, No. 158494; Court of Appeals No. 343788.

PEOPLE v WADE, No. 158497; Court of Appeals No. 343122.

PEOPLE v WRIGHT, No. 158502; Court of Appeals No. 343235.

PEOPLE v THREATT, No. 158522; Court of Appeals No. 337429.

PEOPLE v DRAPER, No. 158523; Court of Appeals No. 343258.

PEOPLE v STOLL, No. 158529; Court of Appeals No. 341926.

PEOPLE v RASMUSSEN, No. 158533; Court of Appeals No. 343182.

PEOPLE v STOLL, No. 158534; Court of Appeals No. 342910.

PEOPLE v DAVID HUDSON, No. 158537; Court of Appeals No. 343976.

PEOPLE v KEVIN HILL, No. 158540; Court of Appeals No. 344553.

PEOPLE v KRYSTAL CLARK, No. 158547; Court of Appeals No. 342695.

PEOPLE v CHERYL JONES, No. 158548; Court of Appeals No. 343397.

PEOPLE v JANKOWIAK, No. 158560; Court of Appeals No. 344743.

PEOPLE v MICHAEL SULLIVAN, No. 158561; Court of Appeals No. 343152.

PEOPLE v CARLOS GARCIA, No. 158562; Court of Appeals No. 343764.

KULHANEK v CRAWFORD, No. 158567; Court of Appeals No. 341849.

PEOPLE v TRIMBLE, No. 158570; Court of Appeals No. 336006.

PEOPLE v PRUETT, No. 158573; Court of Appeals No. 344777.

PEOPLE v CALVIN MURPHY, No. 158575; Court of Appeals No. 343793.

PEOPLE v CHEAVES, No. 158579; Court of Appeals No. 344118.

BOYLE v BOYLE, No. 158589; Court of Appeals No. 335776.

ANDERSON v CLAY, No. 158591; Court of Appeals No. 336999.

ELYAS v JOHNSTON, No. 158602; Court of Appeals No. 342629.

PEOPLE v JUDSON, No. 158604; Court of Appeals No. 338789.

CAVAGNETTO v CAVAGNETTO, No. 158607; Court of Appeals No. 343500.

In re PETITION TO IMPANEL A CITIZENS GRAND JURY, No. 158610; Court of Appeals No. 344468.

MARKMAN, J. I am not participating in this case because of discussions I had as Chief Justice with the State Court Administrative Office concerning aspects of the dispute.

PEOPLE v KARES, No. 158616; Court of Appeals No. 342746.

In re PETITION TO IMPANEL A CITIZENS GRAND JURY, No. 158618; Court of Appeals No. 344581.

MARKMAN, J. I am not participating in this case because of discussions I had as Chief Justice with the State Court Administrative Office concerning aspects of the dispute.

In re BAILEY, No. 158619; Court of Appeals No. 343615.

PEOPLE v ANDRE DAVIS, No. 158628; Court of Appeals No. 344635.

PEOPLE v LIBBY, No. 158630; Court of Appeals No. 344719.

PEOPLE v PRESSWOOD, No. 158634; Court of Appeals No. 339360.

PEOPLE v CAMPBELL, No. 158635; Court of Appeals No. 345250.

PEOPLE v RUZA, No. 158645; Court of Appeals No. 345218.

ELLISON v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 158646; Court of Appeals No. 344091.

PEOPLE v DRUMB, No. 158655; Court of Appeals No. 344616.

PEOPLE v CORTEZ GREEN, No. 158657; Court of Appeals No. 344678.

PEOPLE v FRANKLIN, No. 158674; Court of Appeals No. 343243.

PEOPLE v BLANE WHITE, No. 158675; Court of Appeals No. 345372.

PEOPLE v MARCUS KING, No. 158677; Court of Appeals No. 345122.

PEOPLE v ROBERT GARDNER, No. 158682; Court of Appeals No. 335066.

WOJCIK v MERCHANTS METALS, LLC, No. 158683; Court of Appeals No. 338682.

PEOPLE v MICHAEL MILLER, No. 158688; Court of Appeals No. 340307.

PEOPLE v JOHN ROBINSON, No. 158694; Court of Appeals No. 345154.

PEOPLE v MUKENSTURM, No. 158699; Court of Appeals No. 344969.

PEOPLE v JORDAN WATSON, No. 158701; Court of Appeals No. 345047.

PEOPLE v MICHAEL REED, No. 158708; Court of Appeals No. 343873.

PEOPLE v ALBADRI, No. 158713; Court of Appeals No. 345156.

PEOPLE v ELDER, No. 158714; Court of Appeals No. 339562.

LECHNER v LECHNER, No. 158717; Court of Appeals No. 345326.

PEOPLE v WINN, No. 158720; Court of Appeals No. 345371.

PEOPLE v BRIAN WATKINS, No. 158722; Court of Appeals No. 345128.

KORDOBA, LLC v LANDMARK CONTRACTING COMPANY, No. 158725; Court of Appeals No. 339209.

PEOPLE v COURSER, No. 158729; reported below: 326 Mich App 298.

PEOPLE v CROSS, No. 158736; Court of Appeals No. 335669.

PEOPLE v PEEPLES, No. 158738; Court of Appeals No. 343488.

PEOPLE v HACKLER, No. 158740; Court of Appeals No. 338561.

PEOPLE v UNDERWOOD, No. 158744; Court of Appeals No. 345020.

PEOPLE v DENT, No. 158748; Court of Appeals No. 345077.

WOODS v RE INVESTMENT, INC, No. 158750; Court of Appeals No. 338139.

PANTTI v DANEK, No. 158752; reported below: 326 Mich App 113.

PEOPLE v TIMOTHY YOUNG, No. 158758; Court of Appeals No. 338613.

PEOPLE v RODNEY FORD, No. 158759; Court of Appeals No. 339084.

PEOPLE v TILLERY, No. 158762; Court of Appeals No. 343337.

PEOPLE v RAPPETTE, No. 158772; Court of Appeals No. 345311.

PEOPLE v SAUNDERS, No. 158774; Court of Appeals No. 339629.

CAPITAL ONE, NA v STATE TREASURER, No. 158777; Court of Appeals No. 340635.

PEOPLE v JACOBS, No. 158781; Court of Appeals No. 338355.

THURLOW v WILLIAM BEAUMONT HOSPITAL, No. 158787; Court of Appeals No. 343817.

PEOPLE v JEFFREY BROWN, No. 158791; Court of Appeals No. 343482.

PEOPLE v JEFFREY BROWN, No. 158793; Court of Appeals No. 344495.

SMITH v AUTO CLUB GROUP, No. 158796; Court of Appeals No. 344428.

PEOPLE v GOHAGEN, No. 158806; Court of Appeals No. 339488.

PEOPLE v GARNER, No. 158808; Court of Appeals No. 338568.

PEOPLE v WALEZAK, No. 158809; Court of Appeals No. 338199.

PEOPLE v STEFANSKI, No. 158814; Court of Appeals No. 334510.

WESTWICK SQUARE COOPERATIVE v HIXON, No. 158817; Court of Appeals No. 343842.

PEOPLE v TROY JOHNSON, No. 158826; Court of Appeals No. 337999.

CAVANAUGH v CAVANAUGH, No. 158833; Court of Appeals No. 344359.

PEOPLE v WARD, No. 158835; Court of Appeals No. 344710.

PEOPLE v HULL, No. 158837; Court of Appeals No. 345513.

PEOPLE v POLZIN, No. 158848; Court of Appeals No. 341324.

PEOPLE v AL-SAWADI, No. 158851; Court of Appeals No. 344617.

PEOPLE v TIMMER, No. 158864; Court of Appeals No. 340846.

PEOPLE v ANNIE RUSSELL, No. 158868; Court of Appeals No. 340652.

PEOPLE v MARIAH THOMAS, No. 158872; Court of Appeals No. 335071.

STEVENSON v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 158873; Court of Appeals No. 344119.

PEOPLE v SMOOT, No. 158883; Court of Appeals No. 344088.

PEOPLE v PLIS, No. 158907; Court of Appeals No. 345702.

COREY v DEPARTMENT OF TRANSPORTATION, No. 158935; Court of Appeals No. 340286.

PEOPLE v TONEY WILLIAMS, No. 158936; Court of Appeals No. 339229.

PEOPLE v NASSAR, No. 158944; Court of Appeals No. 345699. On order of the Court, the motion for immediate consideration is granted. The application for leave to appeal the December 13, 2018 order of the Court of Appeals, accepted for filing as to Issue III only, is considered, and it is denied.

PEOPLE v NASSAR, No. 158946; Court of Appeals No. 345808.

PEOPLE v BOLT, No. 158996; Court of Appeals No. 345461.

GRIEVANCE ADMINISTRATOR v HADDEN, No. 159031.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Superintending Control Denied April 2, 2019:

THOMAS v ATTORNEY GRIEVANCE COMMISSION, No. 158821.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied April 2, 2019:

THE MEISNER LAW GROUP PC v WESTON DOWNS CONDOMINIUM ASSOCIATION, No. 157052; reported below: 321 Mich App 702.

Order Directing Oral Argument on Advisory-Opinion Requests Entered April 3, 2019:

In re HOUSE OF REPRESENTATIVES REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2018 PA 368 & 369 and *In re* SENATE REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2018 PA 368 & 369, Nos. 159160 and 159201. On order of the Court, the requests by the

House of Representatives and the Senate for an advisory opinion on the constitutionality of 2018 PA 368 and 2018 PA 369 are considered. We direct the Clerk to schedule oral argument for Wednesday, July 17, 2019, at 9:30 a.m. MCR 7.308(B)(3).

We invite the House of Representatives and the Senate, and any member of either chamber, to file briefs on the following questions: (1) whether the Court should exercise its discretion to grant the requests to issue an advisory opinion in this matter; (2) whether Const 1963, art 2, § 9 permits the Legislature to enact an initiative petition into law and then amend that law during the same legislative session; and (3) whether 2018 PA 368 and 2018 PA 369 were enacted in accordance with Const 1963, art 2, § 9. We respectfully request the Attorney General to submit separate briefs arguing both sides of these questions. Briefs in support of the constitutionality of the enacted legislation shall be filed no later than May 15, 2019. Briefs in opposition to the constitutionality of the enacted legislation shall be filed no later than June 19, 2019. Persons or groups interested in the determination of the questions presented in this matter may move the Court for permission to file briefs amicus curiae on either or both sides, in accordance with the briefing schedule set forth above. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369* (Docket No. 159160) only.

The requests by the House of Representatives and the Senate for an advisory opinion remain pending.

Summary Disposition April 5, 2019:

SOUTHEAST MICHIGAN SURGICAL HOSPITAL, LLC v ALLSTATE INSURANCE COMPANY, No. 154808; reported below: 316 Mich App 657. By order of May 17, 2017, the application for leave to appeal the August 9, 2016 judgment of the Court of Appeals was held in abeyance pending the decision in *Bazzi v Sentinel Ins Co* (Docket No. 154442). On order of the Court, the case having been decided on July 18, 2018, 502 Mich 390 (2018), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals to address: (1) whether the published opinion in this case is consistent with the published opinion in *Baker v Marshall*, 323 Mich App 590 (2018), lv den 503 Mich 861 (2018), and, if not, (2) the impact of MCR 7.215(J)(1) on the two opinions and, if necessary, (3) for reconsideration in light of *Bazzi*. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v CORLEY, No. 155276; Court of Appeals No. 328532. On January 24, 2019, the Court heard oral argument on the application for leave to appeal the December 27, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the defendant's convictions and sentences, and remand this case to the Wayne Circuit Court for a new trial.

In 2015, the defendant was convicted of assault with intent to commit murder, MCL 750.83, assault with a dangerous weapon, MCL 750.82(1), intentionally discharging a firearm from a motor vehicle, MCL 750.234a(1), and possession of a firearm during the commission of a felony, MCL 750.227b(1). The defendant filed a direct appeal and moved to supplement it when he discovered a new witness with exculpatory evidence. The Court of Appeals remanded to the trial court for an evidentiary hearing on the defendant's claims relating to the new evidence.

The trial court denied the defendant's motion for a new trial, holding that as a matter of law—because the eyewitness had a criminal history—his testimony could not make the probability of a different result likely on retrial. The court did not otherwise evaluate the effect the witness's testimony would have had on the result. In an unpublished per curiam opinion, issued December 27, 2016 (Docket No. 328532), the Court of Appeals affirmed the defendant's conviction but remanded the case to the trial court to review his sentences under *People v Lockridge*, 498 Mich 358 (2015).

A new trial should be granted on the basis of newly discovered evidence when a defendant shows: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692 (2003) (quotation marks and citation omitted). The parties agree that the defendant met the first three elements. Only the fourth, prejudice, is in dispute.

The prosecution's case centered on the believability of the victim. The victim testified that a person with long dreadlocks driving a red Mercury Mountaineer shot five or six bullets at him before driving away. He identified the defendant—who had the described hairstyle—in a photo lineup. But the jury also heard that the victim had a criminal conviction involving theft and that he admitted to lying to a physical therapist about his injuries and again under oath at the defendant's preliminary hearing about his middle name.

At the posttrial evidentiary hearing, the newly discovered witness testified that on the day of the shooting, he was in the neighborhood for an unrelated encounter. He was never a suspect in the crime and had no connection to either the defendant or the victim. The defendant found this witness after his mother learned from a family friend at a funeral that he may have witnessed the shooting and hired a private investigator to locate him based only on his social media alias. This witness's account differed from the victim's considerably. He saw no red vehicle; instead, he testified that the shooter, whose hairstyle was short, with brush waves in a circular pattern, approached the victim on foot from in between two houses, fired at least three shots, and ran back in the same direction he came from after the victim fell to the ground.

The eyewitness's testimony plainly undermined the prosecution's evidence. But the trial court did not evaluate that question, instead holding that the witness's criminal history made him not credible as a

general matter. The Court of Appeals majority affirmed but with additional reasoning—that the witness would not have been believed due to his criminal history and the fact that his version of the shooting differed from the victim's. Alternatively, the majority believed that the witness would not be believable due to his distrust of the criminal justice system.

This is an unusual case because the trial court did not make findings of fact that are owed deference. Its holding that the witness is not credible solely as a result of his criminal conviction was erroneous. And we disagree with the Court of Appeals majority's analysis that the new testimony did not make a different result probable on retrial. The prosecution's evidence was not overwhelming, and the new witness's testimony would have undermined that evidence significantly. Notwithstanding his criminal record, this disinterested witness's detailed account makes a different result probable on retrial.

CLEMENT, J. (*dissenting*). I would not grant the defendant in this matter a new trial outright. Instead, I would return this case to the trial court to perform a proper analysis of whether the newly discovered witness could, legally, be impeached with his prior conviction, and to create a better record for reviewing courts to assess on appeal.

Because I disagree with the relief the majority is ordering, I must dissent, but in reality there is less that separates me from the majority than it may seem. I entirely agree that defendant should receive some relief, because the trial court's handling of this case was inadequate. But the trial court's first error, which goes unaddressed in this Court's order, is that it never performed a proper analysis under MRE 609. Defendant's new witness had a prior conviction for armed robbery. The trial court opined that if the witness "had given testimony at the time of trial . . . , certainly his testimony could be impeached, pursuant to MRE 609 . . . ." But MRE 609(a)(2)(B) only allows a prior conviction for a theft offense to be used to impeach a witness if "the court determines that the evidence has significant probative value on the issue of credibility and . . . the court further determines that the probative value of the evidence outweighs its prejudicial effect." A series of exclusive factors to consider in assessing probative value and prejudicial effect is then provided in MRE 609(b), which also says that "[t]he court must articulate, on the record, the analysis of each factor."

A trial court's failure to properly perform an MRE 609 analysis is erroneous. "[A] trial judge may in the exercise of discretion exclude reference to a prior conviction record, and . . . it is error to fail to recognize that he has such discretion and, therefore, to fail or to refuse to exercise it." *People v James Jackson*, 391 Mich 323, 336 (1974), overruled in part on other grounds by *People v Hickman*, 470 Mich 602 (2004), and *McDougall v Schanz*, 461 Mich 15 (1999). "In order to comply with *Jackson* the trial court must positively indicate and identify its exercise of discretion." *People v Cherry*, 393 Mich 261, 261 (1974). In *People v West*, 408 Mich 332, 339-340 (1980), the trial court simply announced " 'Motion *in limine* denied,' " which we held "d[id] not comply with the dictates of *Cherry* and *Jackson*." However, "[r]eversal of the defendant's convictions is not the proper remedy for the trial court's

failure to articulate its reasons for admitting a prior conviction for impeachment on the record, as required by MRE 609(b)." *People v Watts*, 482 Mich 980, 980 (2008). Instead, in *Watts*, we ordered a double remand, directing the Court of Appeals to retain jurisdiction while remanding the case to the trial court "to make a record of its decision to permit impeachment of the defendant with an armed robbery conviction." *Id*. "*Upon completion of that analysis by the trial court*," we directed the Court of Appeals to "consider whether the trial court abused its discretion in admitting the prior conviction . . . ." *Id*. (emphasis added).

Even if we are to assume that the trial court *implicitly* held that the prior conviction here satisfied MRE 609, the court committed a second error: after noting the possibility of impeaching the new witness on the basis of a prior conviction, the court then said that "[t]he defendant's contention that this newly discovered evidence . . . would make a different result probable is therefore . . . untenable." In other words, it apparently concluded that the existence of the prior conviction would *inevitably* have made the new witness incredible in the eyes of a fact-finder. As the Court's order notes, the trial court failed to "otherwise evaluate the effect the witness's testimony would have had on the result." But the Court's order also notes that "[t]his is an unusual case because the trial court did not make findings of fact that are owed deference." I agree that this was an error on the part of the trial court, and that the lack of factual findings makes this an unusual case. However, I believe the proper response is a remand for these missing findings of fact. "[A] judge . . . is obliged to articulate the reasons for his decision in findings of fact." *People v Robert Jackson*, 390 Mich 621, 627 (1973) (addressing bench trials). Where, as here, "[t]here is sufficient doubt whether the judge correctly applied the law to the facts of this case," the appropriate remedy is to "remand for additional fact finding . . . ." *Id*. at 628.

While I agree that defendant in this matter should receive relief, I disagree with the Court's decision to grant defendant a new trial outright, and would instead direct the sort of double remand we indicated in *Watts* was the proper remedy for this error.

ZAHRA, J., joins the statement of CLEMENT, J.

Leave to Appeal Granted April 5, 2019:

PEOPLE v MASALMANI, No. 154773; Court of Appeals No. 325662. By order of May 2, 2017, the application for leave to appeal the September 22, 2016 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Skinner* (Docket No. 152448) and *People v Hyatt* (Docket No. 153081). On order of the Court, the cases having been decided on June 20, 2018, 502 Mich 89 (2018), the application is again considered, and it is granted, limited to the issue whether, in exercising its discretion to impose a sentence of life without parole (LWOP), the trial court properly considered the "factors listed in *Miller v Alabama*, [567 US 460] (2012)" as potentially mitigating circumstances. MCL 769.25(6). See also *Skinner*, 502 Mich at 113-

116. In particular, the parties shall address: (1) which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence; (2) whether the sentencing court gave proper consideration to the defendant's "chronological age and its hallmark features," *Miller*, 567 US at 477-478, by focusing on his proximity to the bright-line age of 18 rather than his individual characteristics; and (3) whether the court properly considered the defendant's family and home environment, which the court characterized as "terrible," and the lack of available treatment programs in the Department of Corrections as weighing against his potential for rehabilitation. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1). The motion to remand is denied.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v TYKEITH TURNER, No. 158068; Court of Appeals No. 336406. The parties shall address: (1) whether a legal misconception concerning a defendant's sentence on one count renders the sentences for other counts arising out of the same transaction invalid; (2) whether the requirements for a motion for relief from judgment must be satisfied before a defendant may be resentenced on other counts where a change in the law requires resentencing for one count, or whether a trial court may exercise its discretion to resentence on other counts where resentencing is required for one count; and (3) if the latter, what parameters apply to the exercise of the court's discretion when deciding whether to resentence on other counts. The time for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 5, 2019:

PEOPLE v BENAVIDES, No. 156193; Court of Appeals No. 337882.

PEOPLE v CHMIELEWSKI, No. 157222; Court of Appeals No. 340860.

MCNA INSURANCE COMPANY v DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET, No. 159173; reported below: 326 Mich App 740.

Summary Disposition April 10, 2019:

PEOPLE v DARELL BROWN, No. 159351; Court of Appeals No. 347265. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted and direct that court to decide this case on an expedited

basis. Trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Summary Disposition April 19, 2019:

PEOPLE v JOHN MOSS, No. 156616; Court of Appeals No. 338877. On March 6, 2019, the Court heard oral argument on the application for leave to appeal the August 21, 2017 order of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. On remand, the Court of Appeals shall specifically address whether a family relation that arises from a legal adoption, see MCL 710.60(2) ("After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons") (1) is effectively a "blood" relation, as that term is used in MCL 750.520b—MCL 750.520e; or (2) is a relation by "affinity," as that term is used in MCL 750.520b—MCL 750.520e, see *Bliss v Caille Bros Co*, 149 Mich 601, 608 (1907); *People v Armstrong*, 212 Mich App 121 (1995); *People v Denmark*, 74 Mich App 402 (1977). We do not retain jurisdiction.

Leave to Appeal Denied April 19, 2019:

PEOPLE v PIERSON, No. 156720; reported below: 321 Mich App 288. On April 10, 2019, the Court heard oral argument on the application for leave to appeal the September 12, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied.

KOSTADINOVSKI v HARRINGTON, No. 156850; reported below: 321 Mich App 736. On April 10, 2019, the Court heard oral argument on the application for leave to appeal the October 24, 2017 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants. On order of the Court, the applications are again considered, and they are denied.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

SUNNYBROOK GOLF BOWL & MOTEL, INC v CITY OF STERLING HEIGHTS, No. 157056; Court of Appeals No. 332357.

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's order denying leave to appeal. I would grant leave to appeal to determine whether the Court of Appeals erred by holding that the Tax Tribunal has authority to make a finding of "omitted real property." Petitioner sought review in the Tax Tribunal of the true cash and taxable values assigned to its property by respondent, the city of Sterling Heights. The Tax Tribunal, on its own initiative, found that respondent's assessor had

omitted certain portions of petitioner's property when determining the true cash value of the property. Based upon this finding of "omitted real property," the Tax Tribunal significantly increased the valuation of petitioner's property, thereby also significantly increasing petitioner's tax liability. Petitioner argued in the Court of Appeals, and now argues in its application for leave to appeal in our Court, that the Tax Tribunal lacked statutory authority to make a determination of omitted real property. Petitioner contends that only the State Tax Commission (the Commission) has the authority to make a finding of omitted real property. I believe the plain language of the relevant statutes may support petitioner's argument.

MCL 205.737(1) provides that "[t]he tribunal shall determine a property's taxable value pursuant to section 27a of the general property tax act, 1893 PA 206, MCL 211.27a." MCL 211.27a(1), in turn, sets a property's "taxable value" at 50% of its "true cash value."[1] Regarding the annual calculation of a property's "taxable value," MCL 211.27a(2) provides:

> (2) Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:
>
> (a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, *plus all additions*. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the property's state equalized valuation in 1994.
>
> (b) The property's current state equalized valuation. [Emphasis added.]

The term "additions," under MCL 211.34d(1)(b), is defined to include "omitted real property." MCL 211.34d(1)(b)(*i*) defines "omitted real property" as "previously existing tangible real property not included in the assessment."

The Legislature has provided specific guidance on how "omitted real property" is to be added to the tax roll. MCL 211.34d(1)(b)(*i*) provides, "Omitted real property for the current and the 2 immediately preceding years, discovered after the assessment roll has been completed, shall be added to the tax roll pursuant to the procedures established in section 154." MCL 211.154(1), in turn, states that "[i]f the state tax commission determines that property subject to the collection of taxes under this act . . . has been incorrectly reported or omitted for any previous year . . . the state tax commission shall place the corrected assessment value for the appropriate years on the appropriate assessment roll." The

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[1] "True cash value" is defined as "the usual selling price at the place where the property to which the term is applied is at the time of assessment . . . ." MCL 211.27(1).

Commission has promulgated in its general rules specific procedures for reporting and assessing omitted real property.[2]

The Tax Tribunal, in turn, has appellate authority to review determinations made by the Commission. MCL 211.154(7) provides that "[a] person to whom property is assessed under this section may appeal the state tax commission's order to the Michigan tax tribunal." The Court of Appeals in past cases has recognized the Tax Tribunal's appellate role. In *Superior Hotels, LLC v Mackinaw Twp*, the Court of Appeals noted that "[t]he Tax Tribunal is vested with jurisdiction over matters previously heard by the State Tax Commission *as an appellate body*."[3]

In *Autodie LLC v Grand Rapids*, the Court of Appeals recognized four areas where the Commission "has original subject-matter jurisdiction to initially hear and investigate petitions"—one of which is "property omitted under MCL 211.154."[4] The Court of Appeals further held that the Tax Tribunal properly refused to address an issue within one of these four areas, since the issue had not been raised before the Commission.[5] The Court of Appeals explained:

> A party may petition the Commission to initiate an investigation of alleged improper assessment. The Commission has original jurisdiction over claims of improper assessment, and *initially* hears and investigates these claims. . . .
>
> * * *
>
> Autodie raised this issue for the first time before the Tax Tribunal. However, the Tax Tribunal was acting as an appellate body reviewing the Commission's decision. The Tax Tribunal did not address Autodie's argument under MCL 211.150(3), likely because the Commission had not made any decision on that ground for it to review. We conclude that the Tax Tribunal properly declined to address this unpreserved issue.[6]

In tension with *Autodie*'s analysis, the Court of Appeals in this case held that the Tax Tribunal "has not only the jurisdiction, but the duty to address omitted property when calculating a property's taxable value."[7] The Court of Appeals reached this conclusion because MCL 205.737

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[2] See Mich Admin Code, R 209.31 *et seq*.

[3] *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 632 (2009) (quotation marks and citation omitted).

[4] *Autodie LLC v Grand Rapids*, 305 Mich App 423, 429 (2014).

[5] *Id*. at 436.

[6] *Id.* at 430 (citations omitted).

[7] *Sunnybrook Golf Bowl & Motel, Inc v Sterling Hts*, unpublished per curiam opinion of the Court of Appeals, issued December 7, 2017 (Docket No. 332357), p 5.

gives the Tax Tribunal the authority to determine a property's taxable value and because MCL 211.154 "does not speak to the Tribunal or to property the Tribunal has determined to have been omitted, nor does it prohibit the Tribunal from adding omitted property to an assessment."[8]

While it is true that MCL 211.154 does not expressly grant exclusive jurisdiction over omitted real property to the Commission, I am troubled by the Court of Appeals' analysis. I am not convinced that the Tax Tribunal's general authority under MCL 205.737 to determine a property's taxable value gives it the specific authority to make initial determinations of omitted real property. The whole-text canon " 'calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.' "[9] Applying that canon here, under MCL 205.737(1) the Tax Tribunal has the power to determine a property's taxable value pursuant to MCL 211.27a. As discussed above, MCL 211.27a requires the calculation of "additions," which, under MCL 211.34d, includes omitted real property. Again, however, MCL 211.34d(b)(*i*) states that "[o]mitted real property . . . shall be added to the tax roll pursuant to the procedures established in section 154." MCL 211.154 then grants the power of determining omitted real property to the Commission.

In short, I am not convinced that the Court of Appeals' opinion is correct. Because this case presents a jurisprudentially significant question about the limits of the Tax Tribunal's authority, I would grant leave to appeal.

Application for Leave to Appeal Dismissed on Stipulation April 19, 2019:

PEOPLE v MANSOUR, No. 158394; reported below: 325 Mich App 339.

Summary Disposition April 25, 2019:

PEOPLE v SEEKINS, No. 155016; Court of Appeals No. 333491. By order of May 1, 2018, the defendant's appellate counsel was directed to file a supplemental brief. On order of the Court, the brief having been received, the application for leave to appeal the November 9, 2016 order of the Court of Appeals is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's June 17, 2016 application for leave to appeal under the standard applicable to direct appeals. Appellate counsel admits that she did not meet with the defendant until two days after the deadline for filing a delayed application for leave to appeal. Accordingly, the defendant was deprived of his

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[8] *Id.* at 3.

[9] *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 367 n 16 (2018), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167.

direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States*, 526 US 23, 28 (1999). We do not retain jurisdiction.

PEOPLE v JOSHUA ROBINSON, No. 156463; Court of Appeals No. 338921. By order of December 14, 2018, the defendant's appellate counsel was directed to file a supplemental brief. On order of the Court, the brief having been received, the application for leave to appeal the July 28, 2017 order of the Court of Appeals is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's June 22, 2017 application for leave to appeal under the standard applicable to direct appeals. Appellate counsel admits that she missed the deadline for filing a direct appeal. Accordingly, the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States*, 526 US 23, 28 (1999). We do not retain jurisdiction.

ZACKS v ZACKS, No. 157770; Court of Appeals No. 342274. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v CLEMMONS, No. 158115; Court of Appeals No. 341484. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and the June 23, 2017 order of the Saginaw Circuit Court denying the defendant's motion for relief from judgment, and we remand this case to the Saginaw Circuit Court for reconsideration of the defendant's motion. We remind the circuit court that its "function is limited when reviewing newly discovered evidence, as it is not the ultimate fact-finder," and that its credibility determination "is concerned with whether a *reasonable juror* could find the testimony credible on retrial." *People v Johnson*, 502 Mich 541, 567 (2018). On remand, the circuit court should consider, in the interest of judicial economy, allowing the defendant to supplement his motion with any additional affidavits. The motion to stay and hold in abeyance is denied as moot. We do not retain jurisdiction.

Order of Suspension Without Pay for 45 Days Entered April 25, 2019:

In re HON JULIE A MCDONALD, 6TH CIRCUIT COURT, BEFORE THE JUDICIAL TENURE COMMISSION, No. 159161. The Judicial Tenure Commission has issued a Decision and Recommendation, to which the respondent, Honorable Julie A. McDonald, 6th Circuit Court Judge, consents. It is accompanied by a settlement agreement, in which the respondent waived her rights and consented to a sanction no greater than a 45-day suspension without pay.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

[E]verything else being equal:

(1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;

(2) misconduct on the bench is usually more serious than the same misconduct off the bench;

(3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;

(4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;

(5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;

(6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;

(7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the Judicial Tenure Commission's stipulated findings of fact, which, following our de novo review, we adopt as our own:

1. On September 8, 2018, respondent was a member of the State Bar of Michigan and an unopposed candidate for a seat as a circuit court judge on the Sixth Judicial Circuit in Oakland County.

2. On September 8, at about 10:45 a.m., respondent was arrested by a Royal Oak, Michigan, police officer on suspicion of driving while intoxicated and littering.

3. The arresting officer initially stopped respondent because she threw a cigarette butt from her car and was traveling [nine miles per hour] over the speed limit on Woodward Avenue.

4. When the officer approached respondent's car he detected a moderate odor of alcohol coming from respondent's car and saw that respondent's eyes appeared watery and bloodshot.

5. Respondent told the officer she had consumed four drinks about 13-18 hours earlier.

6. The officer had respondent perform field sobriety tests. In the officer's opinion, respondent failed the tests.

7. Respondent consented to a preliminary breath test, which showed that respondent had a blood alcohol content of .102 percent. After administering the preliminary breath test the officer asked respondent whether she would be driving if she had her children in the car. She replied that she would not.

8. The results of the preliminary breath test are inadmissible in criminal trials.

9. An hour later, while in custody, respondent took two "Datamaster" breath tests, both of which showed she had a blood alcohol content of .08 percent. The Datamaster has a margin of error of .004 percent, so a reading of .08 percent means the actual blood alcohol content is between .076 percent and .084 percent. Michigan defines driving while intoxicated as having a blood alcohol level of .08 or greater. A blood alcohol content less than .08 may result in a conviction for the lesser offense of driving while visibly impaired.

10. Respondent was charged with operating while intoxicated, disorderly conduct—littering, and having no proof of insurance.

11. On October 31, 2018, respondent pled guilty before Hon. James Wittenberg, 44th District Court, to disorderly conduct—littering, with a plea agreement for a delayed sentence under MCL 771.1 and dismissal upon successful completion of the terms of probation. Respondent also admitted to careless driving, which is a civil infraction. The charge for operating while intoxicated was dismissed. The charge for no proof of insurance was dismissed because respondent demonstrated that the car was insured on September 8.

12. Following respondent's plea, the prosecutor told the press that the plea was based on the facts of the case and not on "who the defendant is, who her father is, who the defendant works for or where she may work in the future." He denied that respondent asked for, or received, any special treatment.

13. On November 6, 2018, respondent was elected circuit judge of the Sixth Judicial Circuit Court for Oakland County.

14. On December 6, 2018, Judge Wittenberg placed respondent on twelve months' probation, [and imposed] a $500 fine, another $1597 in costs, twice daily testing on the Smart Start Mobile Device until further order, outpatient treatment with a therapist, 40 hours of community service, and random drug and alcohol screens. All of the fines and costs have been paid in full.

15. Respondent was fully cooperative with the Royal Oak Police Department at the time of her arrest.

16. Respondent has no criminal record as an adult and no negative disciplinary history with the Attorney Discipline Board. Prior to this incident respondent had a single entry on her driving record for speeding 5 mph over the limit on the expressway in 2015.

17. Immediately after this incident occurred, respondent commenced taking twice daily blood alcohol breath tests on a Smart Start Unit without being ordered to do so by a court. That has continued to the date of this settlement agreement. Respondent has taken more than 290 breath tests on the Smart Start, all of which were negative for alcohol.

18. Respondent has voluntarily taken monthly 10-Panel Drug Screens at Recovery Consultants, Inc., all of which have been negative for any controlled substances.

19. Respondent's tenure as a circuit judge began January 1, 2019.

The standards set forth in *Brown* are also being applied to the Judicial Tenure Commission's legal conclusions to which the respondent stipulated and which we adopt as our own. The Commission concludes, and we agree, that the respondent's conduct constitutes:

A. Misconduct in office as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205, as further described below[;]

B. Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to Code of Judicial Conduct Canon 1, made applicable to respondent, as a judicial candidate, by Canon 5;

C. Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of Code of Judicial Conduct Canon 2(A), made applicable to respondent as a judicial candidate by Canon 5;

D. Conduct involving impropriety and the appearance of impropriety, in violation of Code of Judicial Conduct Canon 2(A), made applicable to respondent as a judicial candidate by Canon 5;

E. Failure to respect and observe the law and to conduct herself at all times in a manner which would enhance the public's confidence in the integrity of the judiciary, contrary to the Code of Judicial Conduct, Canon 2(B), made applicable to respondent as a judicial candidate by Canon 5;

F. Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2);

G. Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

After review of the Judicial Tenure Commission's decision and recommendation, the settlement agreement, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable Julie A. McDonald be suspended without pay for 45 days.

Leave to Appeal Denied April 25, 2019:

PEOPLE v MANIZAK, No. 157585; Court of Appeals No. 342154.

PEOPLE v JESSIE HAYES, PEOPLE v BLACK, and PEOPLE v TIPTON, Nos. 157813, 157814, and 157815; reported below: 323 Mich App 470.

ZACKS v ZACKS, No. 157857; Court of Appeals No. 342295.

PEOPLE v SALEH, No. 157899; Court of Appeals No. 340961.

PEOPLE v PAULITCH, No. 158211; Court of Appeals No. 337949.

PEOPLE v DEANGELO JONES, No. 158229; Court of Appeals No. 343310.

PEOPLE v DONALD BARNES, No. 158274; Court of Appeals No. 337113.

PEOPLE v HENRY HOWARD, No. 158279; Court of Appeals No. 343391.

PEOPLE v NICHOLAS HUDSON, No. 158323; Court of Appeals No. 341748.

In re LANE, No. 158542; Court of Appeals No. 344520.

JACKSON-JAMES v REDFORD UNION HIGH SCHOOL, No. 158735; Court of Appeals No. 337569.

Leave to Appeal Denied April 26, 2019:

In re E SANCHEZ, MINOR, No. 159273; Court of Appeals No. 342062.

Summary Disposition April 30, 2019:

PEOPLE v PHARMS, No. 157360; Court of Appeals No. 335439. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for articulation of its reasons for finding a lack of merit in the questions presented in the defendant's supplemental brief, filed under AO 2004-6 (Minimum Standards for Indigent Criminal Appellate Defense Services), Standard 4, as part of his appeal of right. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

BOTT v DETROIT EDISON COMPANY, No. 158275; Court of Appeals No. 333287. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration of that court's reversal of "the part of the judgment awarding the Botts taxable costs and interest," in light of the fact that the Court of Appeals affirmed the verdict and the defendant has not challenged on appeal the award of costs and interest separately from the verdict. We do not retain jurisdiction.

Leave to Appeal Denied April 30, 2019:

PEOPLE v REYES, No. 157723; Court of Appeals No. 332742.

PEOPLE v LASENBY, No. 157783; Court of Appeals No. 340578.

DOE v BISHOP FOLEY CATHOLIC HIGH SCHOOL, No. 157921; Court of Appeals No. 336795.

MARGARIS v GENESEE COUNTY, No. 157938; reported below: 324 Mich App 111.

PEOPLE v LAWRENCE, No. 158084; Court of Appeals No. 342281.

PEOPLE v HENCE, No. 158088; Court of Appeals No. 342023.

DAVIS v M & T BANK, No. 158119; Court of Appeals No. 338705.

BRETON INSURANCE AGENCY, INC v SECURA INSURANCE COMPANY, No. 158197; Court of Appeals No. 339428.

PEOPLE v WOODLEY, No. 158217; Court of Appeals No. 342539.

PEOPLE v NICHOLSON, No. 158219; Court of Appeals No. 342532.

OLSEN v JUDE AND REED, LLC, Nos. 158238 and 158239; reported below: 325 Mich App 170.

STATE FARM FIRE AND CASUALTY COMPANY v DETROIT EDISON COMPANY and BOTT v DETROIT EDISON COMPANY, Nos. 158265, 158266, and 158267; Court of Appeals Nos. 332454, 333281, and 333287.

STATE FARM FIRE AND CASUALTY COMPANY v DETROIT EDISON COMPANY, Nos. 158269 and 158270; Court of Appeals Nos. 332454 and 333281.

In re ESTATE OF DUANE FRANCIS HORTON II, No. 158332; Court of Appeals No. 339737.

PEOPLE v ALFANZO POLLARD, No. 158345; Court of Appeals No. 338225.

PEOPLE v CLEMONS, No. 158350; Court of Appeals No. 343972.

PEOPLE v AUBREY, No. 158367; Court of Appeals No. 344195.

PEOPLE v BEAUFORD MARTIN, No. 158391; Court of Appeals No. 344366.

LOCKPORT TOWNSHIP v CITY OF THREE RIVERS, No. 158414; Court of Appeals No. 342309.

PEOPLE v MACLEOD, No. 158418; Court of Appeals No. 342615.

PEOPLE v DONELL THOMPSON, No. 158422; Court of Appeals No. 338660.

DETROIT LAND DEVELOPMENT COMPANY, INC v WAYNE COUNTY TREASURER, No. 158424; Court of Appeals No. 338823.

PEOPLE v INGRAM, No. 158449; Court of Appeals No. 342589.

PEOPLE v MACK, No. 158469; Court of Appeals No. 336282.

PEOPLE v RAPHAEL MARTIN, No. 158470; Court of Appeals No. 344112.

PEOPLE v KEITH OLSON, No. 158509; Court of Appeals No. 343017.

VIVIANO, J., did not participate due to a familial relationship with a presiding circuit court judge in this case.

MACLEOD v GILBERT, No. 158518; Court of Appeals No. 343583.

FORNER v TOWNSHIP OF SPRING LAKE, No. 158552; Court of Appeals No. 341017.

PARKS v NIEMIEC, No. 158555; reported below: 325 Mich App 717.

PEOPLE v SUMERLIN, No. 158577; Court of Appeals No. 344381.

PEOPLE v CLIFFORD, No. 158580; Court of Appeals No. 344691.

PEOPLE v STEPHAN, No. 158587; Court of Appeals No. 344645.

PEOPLE v DEANGELO JONES, No. 158600; Court of Appeals No. 345063.

PEOPLE v MOTLEY, No. 158608; Court of Appeals No. 344288.

PEOPLE v JAMIE ADAMS, No. 158613; Court of Appeals No. 338654.

PEOPLE v COBB, No. 158615; Court of Appeals No. 344911.

PEOPLE v STRONG, No. 158617; Court of Appeals No. 342494.

PEOPLE v SARGENT, No. 158621; Court of Appeals No. 339506.

PEOPLE v REGINALD BROWN, No. 158636; Court of Appeals No. 342694.

In re ROBINSON, No. 158665; Court of Appeals No. 343507.

PEOPLE v STANTON-LIPSCOMB, No. 158692; Court of Appeals No. 337433.

PEOPLE v MAURICE JONES, No. 158697; Court of Appeals No. 345770.

PEOPLE v GONZALEZ, No. 158698; Court of Appeals No. 342343.

PEOPLE v WARE, No. 158705; Court of Appeals No. 344938.

CARPEN v ZARZA, No. 158730; Court of Appeals No. 342901.

PEOPLE v VERCRUYSSE, No. 158732; Court of Appeals No. 344071.

PEOPLE v COWELL, No. 158739; Court of Appeals No. 345225.

PEOPLE v COATES, No. 158742; Court of Appeals No. 343688.

ALCOA ENGINEERED STRUCTURES v MICHIGAN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, No. 158757; Court of Appeals No. 343604.

PEOPLE v PATTERSON, No. 158760; Court of Appeals No. 345093.

CALDWELL v BROWN, No. 158761; Court of Appeals No. 343674.

PEOPLE v HOUGH, No. 158763; Court of Appeals No. 345302.

PEOPLE v ISAAC HARRIS, No. 158768; Court of Appeals No. 345175.

PEOPLE v BOYKIN, No. 158771; Court of Appeals No. 345269.

PEOPLE v HENDERSON, No. 158775; Court of Appeals No. 344390.

PEOPLE v DALE PRICE, No. 158776; Court of Appeals No. 345337.

PEOPLE v ELIE, No. 158785; Court of Appeals No. 345591.

PEOPLE v BERRY, No. 158788; Court of Appeals No. 344430.

PEOPLE v DENNIS WARD, No. 158794; Court of Appeals No. 345649.

PEOPLE v NIEMASZ, No. 158799; Court of Appeals No. 337598.

PEOPLE v INGE, No. 158800; Court of Appeals No. 337346.

PEOPLE v TRAVISS, No. 158805; Court of Appeals No. 339619.

PEOPLE v ANGEL PETERSON, No. 158832; Court of Appeals No. 345413.

PEOPLE v MYERS, No. 158838; Court of Appeals No. 345434.

PEOPLE v FREEMAN SHELTON, No. 158841; Court of Appeals No. 345394.

In re ESTATE OF RICHARD T GORDON, *In re* RICHARD T GORDON REVOCABLE TRUST AGREEMENT, *In re* LAUREEN M GORDON REVOCABLE TRUST, and *In re* ESTATE OF LAUREEN M GORDON, Nos. 158843, 158844, 158845, and 158846; Court of Appeals Nos. 339296, 339297, 339299, and 339320.

MEIER v BERGER, No. 158857; Court of Appeals No. 336946.

PEOPLE v PERNELL, No. 158860; Court of Appeals No. 345017.

PEOPLE v ANTHONY BROWN, No. 158861; Court of Appeals No. 337223.

PEOPLE v SIDNEY HILL, No. 158862; Court of Appeals No. 345105.

PEOPLE v SOLDAN, No. 158863; Court of Appeals No. 343858.

PEOPLE v MICHAEL GARY, No. 158865; Court of Appeals No. 343557.

STRICKLAND v SECRETARY OF STATE, No. 158889; Court of Appeals No. 344350.

PEOPLE v CHARLES YOUNG, No. 158891; Court of Appeals No. 345344.

PEOPLE v THIBODEAU, No. 158896; Court of Appeals No. 344395.

PEOPLE v MACON, No. 158897; Court of Appeals No. 344019.

PEOPLE v SLACK, No. 158901; Court of Appeals No. 337135.

CARLISLE v EARNEST C BROOKS CORRECTIONAL FACILITY WARDEN, No. 158914; Court of Appeals No. 344984.

PEOPLE v HUNT, No. 158922; Court of Appeals No. 338980.

PEOPLE v MAXWELL, No. 158937; Court of Appeals No. 337905.

PEOPLE v NAZARIO, No. 158938; Court of Appeals No. 345676.

PEOPLE v ANDRE BROWN, No. 158940; Court of Appeals No. 345376.

PEOPLE v LAPINE, No. 158945; Court of Appeals No. 337719.

PEOPLE v NEWBY, No. 158948; Court of Appeals No. 339699.

PEOPLE v DONTEZ HOWARD, No. 158955; Court of Appeals No. 338289.

WALKER v WILLIAM BEAUMONT HOSPITAL, No. 158957; Court of Appeals No. 337824.

PEOPLE v JEROME HICKS, No. 158959; Court of Appeals No. 345278.

PEOPLE v TALLENT, No. 158961; Court of Appeals No. 346395.

PEOPLE v NIGHSWANDER, No. 158962; Court of Appeals No. 346332.

PEOPLE v SOLOMON, No. 158964; Court of Appeals No. 342169.

PEOPLE v ARTHUR JONES, No. 158967; Court of Appeals No. 345769.

PEOPLE v BRADLEY, No. 158968; Court of Appeals No. 346124.

WHITNEY v SCHULTZ, No. 158971; Court of Appeals No. 338094.

PEOPLE v MUHAMMAD, No. 158978; reported below: 326 Mich App 40.

PEOPLE v JUARNEZ-AYALA, No. 158997; Court of Appeals No. 344722.

PEOPLE v TERENCE KNIGHT, No. 159006; Court of Appeals No. 345963.

PEOPLE v MAUTI, No. 159007; Court of Appeals No. 337958.

PEOPLE v MURRAY, No. 159008; Court of Appeals No. 346013.

PEOPLE v SEALS, No. 159013; Court of Appeals No. 338850.

PEOPLE v BAK, Nos. 159015 and 159016; Court of Appeals Nos. 337132 and 337438.

PEOPLE v BEEMON, No. 159021; Court of Appeals No. 346424.

PEOPLE v TOM WILLINGHAM, No. 159028; Court of Appeals No. 337917.

PEOPLE v LEZOVICH, No. 159040; Court of Appeals No. 345940.

PEOPLE v KEMP, No. 159043; Court of Appeals No. 339791.

PEOPLE v THEDE, No. 159044; Court of Appeals No. 345220.

PEOPLE v ALJAMAILAWI, No. 159048; Court of Appeals No. 339053.
VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v SIGNS, No. 159065; Court of Appeals No. 346444.

PEOPLE v FELICIA BOWLES, No. 159081; Court of Appeals No. 346620.

MCCOY-PRATT v HOSPICE OF HELPING HANDS, INC, No. 159086; Court of Appeals No. 344422.

PEOPLE v HEARN, No. 159094; Court of Appeals No. 342845.
VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v DIMITRI ROBINSON, Nos. 159097 and 159098; Court of Appeals Nos. 337755 and 337928.

SALAMI v MICHIGAN STATE POLICE, No. 159112; Court of Appeals No. 345905.

PEOPLE v MCCALL, No. 159113; Court of Appeals No. 346485.

PEOPLE v SCHOENING, No. 159120; Court of Appeals No. 337779.

PEOPLE v ROBERT HACKNEY, No. 159131; Court of Appeals No. 344662.

PEOPLE v OLSON, No. 159137; Court of Appeals No. 346064.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

LOUIS G BASSO, JR REVOCABLE LIVING TRUST v BASSO, No. 159141; Court of Appeals No. 345412.

PEOPLE v LEE ROBERTS, No. 159148; Court of Appeals No. 346088.

PEOPLE v BIERI, No. 159202; Court of Appeals No. 332376.

Superintending Control Denied April 30, 2019:

CARTWRIGHT v ATTORNEY GRIEVANCE COMMISSION, No. 158820.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied April 30, 2019:

NOTTINGHAM VILLAGE CONDOMINIUM ASSOCIATION v PENSOM, No. 157327; Court of Appeals No. 333311. Leave to appeal denied at 503 Mich 911.

PEOPLE v LUTZ, No. 157496; Court of Appeals No. 336675. Leave to appeal denied at 503 Mich 912.

PEOPLE v MITCHELL, No. 157569; Court of Appeals No. 341853. Leave to appeal denied at 503 Mich 913.

PEOPLE v SIMPSON, No. 157690; Court of Appeals No. 340952. Leave to appeal denied at 503 Mich 913.

PEOPLE v BIRD, No. 157758; Court of Appeals No. 342030. Leave to appeal denied at 503 Mich 913.

PEOPLE v CHARLES HAWKINS, No. 157875; Court of Appeals No. 341088. Leave to appeal denied at 503 Mich 888.

PEOPLE v MCCOY, No. 157992; Court of Appeals No. 340731. Leave to appeal denied at 503 Mich 914.

PEOPLE v CHAPPEL, No. 158021; Court of Appeals No. 336794. Leave to appeal denied at 503 Mich 914.

PEOPLE v HOLLOWAY, No. 158039; Court of Appeals No. 342720. Leave to appeal denied at 503 Mich 889.

PEOPLE v ELAM, No. 158050; Court of Appeals No. 341993. Leave to appeal denied at 503 Mich 931.

PEOPLE v MANNION, No. 158093; Court of Appeals No. 342768. Leave to appeal denied at 503 Mich 915.

PEOPLE v MASA, No. 158099; Court of Appeals No. 343311. Leave to appeal denied at 503 Mich 915.

PEOPLE v FISHER, No. 158205; Court of Appeals No. 343619. Leave to appeal denied at 503 Mich 915.

PEOPLE v EVANS, No. 158207; Court of Appeals No. 343666. Leave to appeal denied at 503 Mich 916.

SPENCER v SPENCER, No. 158254; Court of Appeals No. 342513. Leave to appeal denied at 503 Mich 916.

QAFLESHI v LINCOLN GENERAL INSURANCE COMPANY, No. 158340; Court of Appeals No. 335835. Leave to appeal denied at 503 Mich 916.

Summary Disposition May 1, 2019:

In re CURRY, MINORS, No. 159227; Court of Appeals No. 343669. On order of the Court, the application for leave to appeal the February 12, 2019 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment holding that the circuit court did not clearly err in finding that statutory bases for termination were supported by "clear and convincing" evidence and that termination of the respondent-father's parental rights was in the best interests of the children. We remand this case to the Court of Appeals, which, while retaining jurisdiction, shall remand this case to the Oakland Circuit Court, Family Division. The remand to the circuit court shall direct that court to reconsider its November 14, 2017 opinion and order holding that the petitioner established statutory bases for termination and its April 12, 2018 order terminating the respondent-father's parental rights. On reconsideration, the circuit court shall apply the "clear and convincing" evidentiary standard to the allegation of sexual abuse against the respondent-father. See MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), and (j). See also MCR 3.977(E); *In re Trejo Minors*, 462 Mich 341, 355 (2000). The circuit court may, in its discretion, receive proofs or hold an evidentiary hearing. The circuit court shall be directed to forward to the Court of Appeals a written opinion addressing the statutory bases for termination and, if necessary, the decision to terminate parental rights, within 42 days of the Court of Appeals remand order. In light of our resolution of this issue, it is unnecessary to address the respondent-father's remaining issues. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 3, 2019:

MANIACI v DIROFF, No. 158005; Court of Appeals No. 333952. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether his proposed alterations to Parcel B fall within the scope of the easement created by the 2015 consent judgment. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). Appellee Kenneth G. Siler and Tonya L. Siler Revocable Trust shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied May 10, 2019:

WADE v MCCADIE, No. 156950; Court of Appeals No. 335418.

VIVIANO, J. (*concurring*). I concur with the denial order because I believe the Court of Appeals reached the right result by upholding the trial court's grant of summary disposition in favor of defendants under *Scarsella v Pollak*, 461 Mich 547, 549 (2000) (holding that an affidavit of merit (AOM) is necessary to toll the statute of limitations in a medical malpractice case). I write separately because I continue to question whether *Scarsella* was correctly decided. See *Castro v Goulet*, 501 Mich 884, 889 (2017) (VIVIANO, J., concurring) (stating my belief that under a plain reading of the statutory scheme, "the AOM has no effect on commencing a lawsuit for purposes of the statute of limitations"). Under my reading of the pertinent statutes, although dismissal may still be warranted under a different rule, it would not be warranted under MCR 2.116(C)(7) for failure to comply with the statute of limitations.[1] But since no party has asked us to reconsider *Scarsella*,[2] I concur with the Court's denial order in this case.

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[1] Whether dismissal would still be warranted for failing to file an affidavit of merit if Scarsella were overturned and, if so, on what grounds, are interesting questions that would need to be addressed in an appropriate future case.

[2] In arguing that the Court of Appeals should have applied equitable tolling, plaintiff points to *Ward v Rooney-Gandy*, 265 Mich App 515, rev'd 474 Mich 917 (2005), and *Young v Sellers*, 254 Mich App 447 (2002). These cases only call into question how Scarsella should be applied. Thus, plaintiff raises no argument as to whether Scarsella's interpretation of the pertinent statutes is correct.

UNITED METHODIST RETIREMENT COMMUNITIES, INC v CITY OF CHELSEA, No. 158198; Court of Appeals No. 337998.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. Instead, I would grant leave to appeal to reconsider this Court's holdings in *Mich Baptist Homes & Dev Co v Ann Arbor*, 396 Mich 660 (1976), and *Retirement Homes of the United Methodist Church v Sylvan Twp*, 416 Mich 340 (1982), in light of our more recent holding in *Baruch SLS, Inc v Tittabawassee Twp*, 500 Mich 345 (2017). More specifically, I would grant to consider whether this Court's holding in *Baruch* logically compels an alternative analysis for determining whether a charitable institution is precluded from receiving a property-tax exemption under MCL 211.7o because its property is not "occupied by [it] solely for the purposes for which [it] was incorporated . . . ." MCL 211.7o(1).

Petitioner United Methodist Retirement Communities seeks a tax exemption under MCL 211.7o for property it owns and operates as a residential retirement facility for senior citizens. MCL 211.7o(1) provides:

> Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.

The Tax Tribunal denied petitioner an exemption on the grounds that its property was not "occupied by [it] solely for the purposes for which [it] was incorporated," MCL 211.7o(1), and the Court of Appeals affirmed, relying on this Court's decisions in *Mich Baptist* and *Retirement Homes*. In those cases, this Court denied tax exemptions under MCL 211.7o to retirement homes on the basis that their properties were not occupied solely for the purposes for which they were incorporated. We reasoned that this requirement was only satisfied if the homes "benefit[ed] the general public without restriction," *Mich Baptist*, 396 Mich at 671; see also *Retirement Homes*, 416 Mich at 349, and that the homes in dispute did not do so because they did not help the elderly population generally, but rather only a subset of relatively less infirm and relatively less financially needy individuals, *Mich Baptist*, 396 Mich at 671-672; *Retirement Homes*, 416 Mich at 349-353.

Petitioner here argues that the Court of Appeals erred by relying on these two cases because their reasoning was effectively rejected in *Baruch*, 500 Mich 345 (2017). In *Baruch*, we addressed one of the six factors that this Court had previously laid out in *Wexford Med Group v City of Cadillac*, 474 Mich 192 (2006), for determining whether an institution is "charitable." As relevant to the instant case, *Wexford* held that the third of these factors is:

> A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it pur-

> ports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered. [*Id*. at 215.]

Baruch, however, clarified that this factor only "ban[s] restrictions or conditions on charity that bear no reasonable relationship to an organization's legitimate charitable goals" and further explained that "the 'reasonable relationship' test should be construed quite broadly to prevent unnecessarily limiting the restrictions a charity may choose to place on its services." *Baruch*, 500 Mich at 357-358.

Petitioner contends that *Baruch* overruled *Mich Baptist* and *Retirement Homes*, which denied charitable tax exemptions on the basis of limitations that those institutions placed on those who could receive their services absent consideration of whether there was a reasonable relationship between those limitations and the organizations' legitimate charitable goals. The Court of Appeals rejected this argument, asserting that *Baruch* had exclusively addressed whether an institution was "charitable," whereas *Mich Baptist* and *Retirement Homes* addressed whether a charitable institution "occupied the premises solely for the purposes for which it was incorporated." *United Methodist Retirement Communities, Inc v City of Chelsea*, unpublished per curiam opinion of the Court of Appeals, issued May 22, 2018 (Docket No. 337998), pp 5-6.

I would grant leave to reconsider *Mich Baptist* and *Retirement Homes* in light of *Baruch* for three related reasons.

First, *Wexford* factor three, which this Court interpreted in *Baruch*, was arguably derived from the same two cases (*Mich Baptist* and *Retirement Homes*) that also supply the standard for determining whether a property is "occupied by that nonprofit charitable institution solely for the purposes for which [it] was incorporated . . . ." MCL 211.7o(1). In *Wexford*, before laying out the factors relevant to determining whether an institution is "charitable," this Court analyzed *Mich Baptist* and *Retirement Homes*. *Wexford*, 474 Mich at 209-212. Indeed, *Wexford* factor three substantially reflects the analysis that we employed in *Mich Baptist* and *Retirement Homes*. If *Wexford* factor three was indeed derived from the same cases that defined the standard for whether a property is "occupied by that nonprofit charitable institution solely for the purposes for which [it] was incorporated," MCL 211.7o(1), then our interpretation of the former in *Baruch* may well be relevant to the interpretation of the latter.

Second, the reasoning that this Court employed in *Mich Baptist* and *Retirement Homes* is strikingly similar to the reasoning that this Court rejected in *Baruch*. *Mich Baptist* and *Retirement Homes* held that in order to be entitled to a tax exemption, a retirement home must serve the elderly population generally "without restriction." *Mich Baptist*, 396 Mich at 671; *Retirement Homes*, 416 Mich at 349. *Baruch* noted the impracticality of such a requirement, remarking that "if an institution cannot serve everyone who could benefit from the service (as most cannot), surely it will have to select its beneficiaries in some manner," *Baruch*, 500 Mich at 355, and thus rejected the conclusion that a charitable institution must "allocate[] its services using an arbitrary

metric, such as a lottery or first-come, first-serve," *id*. at 356. This reasoning would seemingly apply equally in the instant context, thereby calling into question our reasoning in *Mich Baptist* and *Retirement Homes*.

Third, in light of the similarities between the analytical approaches set forth in *Mich Baptist* and *Retirement Homes* and that rejected in *Baruch*, the latter would be undermined considerably if the former remained good law, as a charity that would otherwise be exempt under *Baruch* would, far more often than not, still be denied an exemption as a result of the analyses of *Mich Baptist* and *Retirement Homes*. *Baruch* held that institutions are not precluded from receiving a charitable exemption merely because they are governed by standards for determining which persons—among the general population they purport to serve—will qualify for their services. See *id*. at 357-358. However, *Mich Baptist* and *Retirement Homes* suggest that no such standards are permitted and that an institution is entitled to an exemption only if it assists "without restriction" the population it purports to serve. *Mich Baptist*, 396 Mich at 671; *Retirement Homes*, 416 Mich at 349. And an institution must satisfy both standards in order to be entitled to a charitable tax exemption. Yet *Mich Baptist* and *Retirement Homes* seemingly preclude nearly any restrictive standard as to who can receive an institution's services while *Baruch* allows such restrictions so long as they are "reasonable." If a charity that satisfies *Baruch* is nonetheless to be precluded from an exemption by *Mich Baptist* and *Retirement Homes*, then *Baruch*, despite being the most recent of this Court's relevant decisions, would seem to have little practical effect in giving meaning to MCL 211.7o. This uncertain relationship between these decisions suggests strongly the wisdom of giving further appellate consideration to the present dispute.

Petitioner, in my judgment, raises a substantial question as to whether, in light of *Baruch*'s rejection of an analysis substantially similar (if not identical) to this Court's analyses in *Mich Baptist* and *Retirement Homes*, these prior decisions can be maintained. The former stands for the proposition that "reasonable" standards can be applied in determining which members of the community a charitable institution purports to serve will actually be provided services, while the latter seemingly stands for the proposition that the process of applying such standards is, by itself, disqualifying as a "charitable institution." "[I]t is [this Court's] obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by"—and, in my judgment, will be confused by—"that authority." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 192-193 (2016) (quotation marks and citation omitted). I would grant leave to appeal to consider whether *Mich Baptist* and *Retirement Homes* should be reconsidered in light of *Baruch* or whether these cases somehow can be reconciled.

PEOPLE v JUSTIN BOWLES, No. 158926; Court of Appeals No. 339186.

In re KM HOUSER, MINOR, No. 159414; Court of Appeals No. 344712.

Leave to Appeal Denied May 15, 2019:

MEIER v AWAAD, No. 159432; Court of Appeals No. 346443.

PEOPLE v GRIFFIN, No. 159547; Court of Appeals No. 348172.

Leave to Appeal Denied May 17, 2019:

PEOPLE v LEWIS, No. 156806; reported below: 322 Mich App 22.

MCCORMACK, C.J. (*concurring*). I concur in the order denying leave to appeal and write separately to highlight two errors I believe the Court of Appeals made in its published opinion and to reiterate my hope that the United States Supreme Court will clarify the proper application of harmless-error analysis in this context. Given the current law, I cannot say that the Court of Appeals erred in its conclusion that the error here was harmless. I reluctantly agree with the order denying leave to appeal.

I think the Court of Appeals' analysis of the first factor that *Coleman v Alabama*, 399 US 1 (1970), identifies as important to the role for counsel at a preliminary examination is flawed. The first *Coleman* factor is "the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over." *Id*. at 9. The panel reasoned that "[g]iven that defendant was convicted at trial on the basis of sufficient evidence, the possibility that counsel could have detected preclusive flaws in the prosecution's probable-cause showing is moot." *People v Lewis (On Remand)*, 322 Mich App 22, 31 (2017). But in our prior opinion, we explained that *Coleman* does not permit a court to presume that if a defendant is ultimately convicted after a fair trial, he suffered no harm from the deprivation of counsel at the preliminary examination. *People v Lewis*, 501 Mich 1, 11 (2017). While the Court of Appeals cited that passage in its analysis, it nonetheless stated that the fact of the conviction "is relevant to our consideration of the first *Coleman* factor." *Lewis (On Remand)*, 322 Mich App at 31. Whatever the correctness of that statement (and I express no opinion on it), the panel then said that the defendant's conviction made this factor *moot*. That is, the Court of Appeals seemingly made the fact of the conviction at trial dispositive to its analysis of the first factor, which this Court said is not permissible.[1]

The panel's analysis of the second *Coleman* factor is also flawed. That factor is "the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial."

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[1] The Court of Appeals cited Coleman in support of its analysis of this factor, but its citation was to Justice White's concurring opinion, which of course is nonbinding. *Lewis (On Remand)*, 322 Mich App at 31, citing *Coleman*, 399 US at 18 (White, J., concurring).

Coleman, 399 US at 9. The Court of Appeals relied heavily on the fact that trial counsel was given a transcript of the preliminary examination in concluding that this factor weighed in favor of finding the error harmless. But this misses the point: a transcript of a preliminary examination conducted without the benefit of defense counsel doesn't address the problem that the prosecution's witnesses were not cross-examined at that hearing. And like the panel's analysis of the first factor, this reasoning would result in finding error harmless in every case conducted in absence of defense counsel: preparing a transcript isn't the problem; it's that the transcript is unhelpful. Thus, counsel's possession of the preliminary examination transcript is entitled to little weight in the analysis.

Despite these flaws, I believe the Court of Appeals correctly concluded that any error in depriving the defendant of counsel at the preliminary examination was harmless. The panel correctly analyzed the remaining *Coleman* factors and specific circumstances of this case. But I reach this conclusion largely because *Coleman* takes "the two perhaps most intuitive options for assessing harm off the table," *Lewis*, 501 Mich at 12, leaving reviewing courts without much guidance about how to apply harmless-error review in this context. Guidance from the United States Supreme Court would be welcome. I hope that Court will either provide such guidance or clarify "whether the *Coleman* harmless-error review remains a sustainable rule when a defendant is denied counsel at a preliminary examination." *Lewis*, 501 Mich at 16 (MCCORMACK, J., concurring).

BERNSTEIN and CLEMENT, JJ., join the statement of MCCORMACK, C.J.

PEOPLE v CHANDLER, No. 158541; Court of Appeals No. 333207.

MCCORMACK, C.J., (*concurring*). I concur in the Court's order denying leave to appeal because I agree with the Court of Appeals that any error in the trial court's decision to admit other-acts evidence under MRE 404(b) was harmless. I write separately, however, because I disagree with the Court of Appeals' 404(b) analysis. I believe that the trial court abused its discretion by admitting the other-acts evidence.

Although the Court of Appeals correctly recited the relevant standard from *People v Golochowicz*, 413 Mich 298, 309-311 (1982), it didn't apply it. Rather than determining whether the two acts shared "some special quality . . . that tends to prove the defendant's identity," *id*. at 309, the Court of Appeals compared the similarities and differences of the two shoplifting offenses, concluding that "the peculiarities of defendant's conduct in each circumstance are sufficiently similar to each other and sufficiently atypical as compared to the general class of offenses to earmark the charged offense as defendant's handiwork." *People v Chandler (On Remand)*, unpublished opinion of the Court of Appeals, issued August 21, 2018 (Docket No. 333207), p 5.

But more-alike-than-different is not the standard, as the panel recognized. Rather, the crime must be " 'so unusual and distinctive as to be like a signature,' " *Golochowicz*, 413 Mich at 310-311 (citation omitted), and the "manners or systems employed by the perpetrator of the uncharged crime and the crime in question" must involve "such

distinctive, unique, peculiar or special characteristics as to justify an ordinarily reasonable juror to infer that both were the handiwork of the same person," *id*. at 312. The "peculiarities" identified here were (1) robbing "a small, local business," (2) giving an excuse when confronted about the shoplifting, and (3) fleeing the scene at high speed on residential streets. *Chandler (On Remand)*, unpub op at 5. The panel did not describe the characteristics of "the general class of offenses" against which the defendant's crimes stood out as atypical. *Id*. Nor do these "peculiarities" seem peculiar enough to be like a signature.

Thus, in my view, the evidence did not satisfy *Golochowicz* and admitting it was error. But I agree with the Court of Appeals' alternative holding that any error was harmless in light of the "abundant other evidence" from which the jury could infer identity. *Id*. at 6.

Summary Disposition May 22, 2019:

PEOPLE v WASHINGTON, No. 156648; reported below: 321 Mich App 276. On October 10, 2018, the Court heard oral argument on the application for leave to appeal the September 12, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to that court for reconsideration in light of *Luscombe v Shedd's Food Products Corp*, 212 Mich App 537 (1995).

CLEMENT, J. (*dissenting*). I respectfully dissent from this Court's order vacating the judgment of the Court of Appeals and remanding for reconsideration in light of *Luscombe v Shedd's Food Prod Corp*, 212 Mich App 537 (1995), because I do not believe that consideration of *Luscombe* is necessary to decide the issues on appeal.

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

PEOPLE v DARYL DAVIS, No. 158048; Court of Appeals No. 341535. Pursuant to MCR 7.305(H)(1), in light of the prosecutor's concession that defendant was not subject to a mandatory 25-year minimum sentence under MCL 769.12(1)(a), we vacate the July 29, 2016 amended judgment of sentence, and we remand this case to the Macomb Circuit Court to reinstate the April 26, 2016 amended judgment of sentence. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Leave to Appeal Granted May 22, 2019:

MAYS v GOVERNOR OF MICHIGAN, Nos. 157335, 157336, 157337, 157340, 157341, and 157342; reported below: 323 Mich App 1. The parties shall include among the issues to be briefed: (1) when the plaintiffs' cause of action accrued, see *Henry v Dow Chemical Co*, 501 Mich 965 (2018), and *Frank v Linkner*, 500 Mich 133 (2017); (2) whether the Court of Appeals erred in holding that the fraudulent concealment exception in MCL 600.5855 applies to the statutory notice period in MCL 600.6431(3); (3)

whether the Court of Appeals erred in holding that under the Court of Claims Act, MCL 600.6401 *et seq*., there is a "harsh and unreasonable consequences" exception to the notice requirement of MCL 600.6431(3) when a constitutional tort is alleged, compare *McCahan v Brennan*, 492 Mich 730 (2012), and *Rusha v Dep't of Corrections*, 307 Mich App 300 (2014); (4) if there is such an exception, whether it is met by the facts alleged in the plaintiffs' amended complaint; (5) whether the Court of Appeals erred in recognizing a constitutional tort for violation of bodily integrity under Const 1963, art 1, § 17, and, if not, whether the plaintiffs properly alleged such a violation, and whether a damages remedy is available for such a violation, see *Smith v Dep't of Public Health*, 428 Mich 540 (1987); *Jones v Powell*, 462 Mich 329 (2000); (6) for purposes of the plaintiffs' inverse condemnation claim, whether the plaintiffs have alleged direct action by defendants against the plaintiffs' property, and a special or unique injury, see *Peterman v Dep't of Natural Resources*, 446 Mich 177, 190 (1994); *Spiek v Dep't of Transp*, 456 Mich 331, 348 (1998); and (7) for purposes of the plaintiffs' inverse condemnation claim, the manner in which the class of similarly situated persons should be defined.

The total time allowed for oral argument shall be 60 minutes: 30 minutes for plaintiffs, and 30 minutes for defendants, to be divided at their discretion. MCR 7.314(B)(1).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Mays v Governor* (Docket Nos. 157335-7) only and served on the parties in both cases.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

MEEMIC INSURANCE COMPANY v FORTSON, No. 158302; reported below: 324 Mich App 467. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1). Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 22, 2019:

MENARD v IMIG, No. 158563; Court of Appeals No. 336220. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the Court of Appeals erred in its determination of cause-in-fact; and (2) whether the narrowing of the roadway combined with the oncoming driver's use of high-beam headlights, or any other cause-in-fact, was a proximate cause of the accident. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days

of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

SANDERS V TUMBLEWOOD SALOON, INC, No. 158789; Court of Appeals No. 338937. The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred when it concluded that there was a genuine question of fact as to whether there was an attorney-client relationship between the plaintiffs and the attorney who sent the initial letter on their behalf to one of the defendants. In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied May 22, 2019:

In re PETITION OF BERRIEN COUNTY TREASURER FOR FORECLOSURE, No. 158042; reported below: 323 Mich App 600.

TOWNSHIP OF WILLIAMSTOWN V SANDALWOOD RANCH, LLC, No. 158171; reported below: 325 Mich App 541.

PEOPLE V SWANK, No. 158263; Court of Appeals No. 343601.

PEOPLE V MILES, No. 158383; Court of Appeals No. 335731.

PEOPLE V HAMPTON, No. 158689; Court of Appeals No. 337431.

Summary Disposition May 23, 2019:

In re PILAND, MINORS, No. 157918; reported below: 324 Mich App 337. On April 10, 2019, the Court heard oral argument on the application for leave to appeal the May 15, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we affirm the holding of the Court of Appeals that MCL 722.634 applies to child protective proceedings. We also agree with the respondents that, in a proceeding under MCL 712A.2(b)(1), the availability of an instruction based on MCL 722.634 does not depend on whether the respondents' failure to provide specified medical treatment for a child is characterized as an act of neglect or an act of refusal. We nevertheless vacate that part

of the judgment of the Court of Appeals stating that "the trial court *must* instruct the jury that '[a] parent or guardian legitimately practicing his religious belief who thereby does not provide medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian.' " (Emphasis added.) This part of the Court of Appeals' judgment was premature, because the respondents' entitlement to a jury instruction based on MCL 722.634 depends on the evidence that is ultimately presented at the respondents' adjudication trial. See, e.g., *Camden Fire Ins Co v Kaminski*, 352 Mich 507, 511 (1958); see also MCR 2.512. We remand this case to the Ingham Circuit Court for further proceedings. On remand, the trial court must provide an instruction that is consistent with MCL 722.634 if such an instruction is requested by the respondents and if a rational view of the evidence supports the conclusion that the failure to provide medical treatment was based on the respondents' legitimate practice of their religious beliefs. We do not retain jurisdiction.

Summary Disposition May 24, 2019:

PEOPLE v SOLLOWAY, No. 158638; Court of Appeals No. 343238. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Cass Circuit Court's January 9, 2018 order denying relief from judgment, and we remand this case to that court to re-evaluate the defendant's motion for relief from judgment, including (if the motion is not returned to the defendant) the November 29, 2018 affidavit of investigator Joseph Bruce. The circuit court erred by: (1) purporting to deny the defendant's motion as not complying with MCR 6.502(C), when the proper relief for such a defect is, under MCR 6.502(D), either returning the motion to the defendant or adjudicating the motion on the merits notwithstanding the defect; (2) treating the defendant's motion for relief from judgment as a successive motion; and (3) concluding that the claim of new evidence had been previously resolved against the defendant on appeal. The motions to remand for an evidentiary hearing, to expand the record, to stay, and for immediate consideration of the motion to stay are denied as moot.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 24, 2019:

PEOPLE v GARY GILMORE, No. 158716; Court of Appeals No. 334205. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the defendant waived the question of his entitlement to an evidentiary hearing regarding the amount of restitution, compare *People v Gahan*, 456 Mich 264, 276 (1997), overruled in part by *People v McKinley*, 496 Mich 410, 413 (2014) (stating that the failure to affirmatively request an evidentiary hearing regarding restitution is a waiver of a defendant's due process claim on appeal) with *People v Carter*, 462 Mich 206, 215 (2006) (defining waiver as "the intentional relinquishment or abandonment of a known right" and distinguishing waiver from

forfeiture, which has been defined as "the failure to make the timely assertion of a right."); and if not, (2) whether the Wayne Circuit Court erred in denying the defendant such a hearing. See *McKinley*, 496 Mich 410. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Summary Disposition May 28, 2019:

APEX LABORATORIES INTERNATIONAL INC v CITY OF DETROIT, No. 157996; Court of Appeals No. 338218. By order of February 4, 2019, the application for leave to appeal the May 17, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *Henderson v Civil Serv Comm* (Docket No. 156270). On order of the Court, the case having been decided on March 15, 2019, 503 Mich 978 (2019), the application is again considered, and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *S Dakota v Wayfair, Inc*, ___ US ___; 138 S Ct 2080, 2099; 201 L Ed 2d 403 (2018), which overruled *Quill Corp v North Dakota ex rel Heitkamp*, 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992). We do not retain jurisdiction.

GOTTLEBER v COUNTY OF SAGINAW, No. 158301; Court of Appeals No. 336011. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of an argument made by the defendant but not directly addressed by that court during its initial review of this case regarding whether the defendant had a legal duty or obligation to continue pumping and draining water on its land in order to sustain a particular groundwater level for the benefit of the plaintiffs' property. If it is determined on remand that the defendant owed no such duty or obligation, the Court of Appeals should also consider whether the defendant "abused its legitimate powers" when it took "affirmative actions" in the absence of any duty or obligation that potentially were "directly aimed at the plaintiff[s'] property." See *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 295 (2009). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v GIBSON, No. 158403; Court of Appeals No. 343217. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the November 7, 2017 order of the Lenawee Circuit Court and remand this case to that court for reconsideration of defendant's motion for relief from judgment and amended motion for relief from judgment solely

under MCR subchapter 6.500. The trial court erred in citing MCR 2.612(C)(2) as a reason for denying defendant's motion because "[u]nless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of" subchapter 6.500. MCR 6.501. The motion to appoint counsel is denied.

PEOPLE v TIMOTHY JOHNSON, No. 158951; Court of Appeals No. 345710. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Wayne Circuit Court's May 7, 2018 opinion and order denying relief from judgment, and we remand this case to that court to address whether the defendant has met his burden under MCR 6.508(D) of establishing (1) good cause for failing to raise on direct appeal the issue raised in his motion for relief from judgment, and (2) actual prejudice. The court shall address whether the defendant's appellate counsel's failure to raise this issue on direct appeal constituted ineffective assistance of appellate counsel. See *People v Reed*, 449 Mich 375 (1995). We do not retain jurisdiction.

PEOPLE v CARLSON, No. 159079; Court of Appeals No. 346234. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We note that the Court of Appeals currently has before it the case of *People v Clark*, Docket No. 345459. The *Clark* case involves an issue similar to an issue presented in this case, and the court's disposition in *Clark* may be instructive in resolving that issue.

COEUS, LLC v A&M ENGINEERS, LLC, No. 159382; Court of Appeals No. 346880. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Leave to Appeal Denied May 28, 2019:

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES, No. 156802; reported below: 322 Mich App 480.

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES, No. 157012; reported below: 322 Mich App 480.

YOUNG v DEPARTMENT OF CORRECTIONS, No. 157399; Court of Appeals No. 331352.

BURKS v INDEPENDENT BANK, No. 157757; Court of Appeals No. 341566.

PEOPLE v LLOYD, No. 158092; Court of Appeals No. 341320.

PEOPLE v GOODWIN, No. 158130; Court of Appeals No. 337329.

PEOPLE v GOODWIN, No. 158132; Court of Appeals No. 338266.

PEOPLE v GRINNELL, No. 158430; Court of Appeals No. 335990.

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES, No. 158437; Court of Appeals No. 334276.

PEOPLE v BRIAN GARCIA, No. 158489; Court of Appeals No. 343903.

LENTZ v DEPARTMENT OF CORRECTIONS, No. 158519; Court of Appeals No. 342907.

PEOPLE v ELLIS, No. 158521; Court of Appeals No. 342689.

LITTLE TREE SUSHI BAR, INC v CITY OF ROYAL OAK, No. 158590; Court of Appeals No. 341606.

PEOPLE v BRANDON PORTER, No. 158647; Court of Appeals No. 344433.

BRIGGS v SZYDLOWSKI, No. 158650; Court of Appeals No. 340713.

MIC GENERAL INSURANCE CORP v MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, No. 158676; Court of Appeals No. 341766.

PEOPLE v DALE THOMPSON, No. 158704; Court of Appeals No. 344051.

PEOPLE v LARRY SMITH, No. 158743; Court of Appeals No. 340845.

PEOPLE v LOVETT, No. 158753; Court of Appeals No. 345157.

PEOPLE v HODGE, No. 158780; Court of Appeals No. 344269.

PEOPLE v HYDE, No. 158783; Court of Appeals No. 339225.

SHROCK v CITY OF LINDEN, No. 158786; Court of Appeals No. 340759.

PEOPLE v GRIGGS, No. 158804; Court of Appeals No. 338583.

PEOPLE v TYRELL BAKER, No. 158815; Court of Appeals No. 338799.

PEOPLE v WALLACE, No. 158822; Court of Appeals No. 335070.

STATE TREASURER v BROWN, No. 158842; Court of Appeals No. 343703.

AUTO-OWNERS INSURANCE COMPANY v SHAFFER, No. 158879; Court of Appeals No. 343841.

PEOPLE v PAGE, Nos. 158899 and 158900; Court of Appeals Nos. 345554 and 345555.

PEOPLE v REGISTER, No. 158906; Court of Appeals No. 339630.

In re POLK REVOCABLE TRUST, No. 158913; Court of Appeals No. 344601.

PEOPLE v HARDY, No. 158917; Court of Appeals No. 338892.

ZIGLER v DEPARTMENT OF CORRECTIONS, No. 158920; Court of Appeals No. 344783.

PEOPLE v JUSTIN HOWARD, No. 158965; Court of Appeals No. 346018.

PEOPLE v MATTHEWS, No. 158970; Court of Appeals No. 330933.

In re RAYMOND L FRICK TRUST, No. 158984; Court of Appeals No. 341498.

PEOPLE v MERRILL, No. 158985; Court of Appeals No. 339874.

RADWAN v AMERIPRISE INSURANCE COMPANY, No. 159003; reported below: 327 Mich App 159.

SHACKELFORD v ALARIS GROUP, INC, No. 159012; Court of Appeals No. 339625.

IRWIN v COVENANT MEDICAL CENTER, INC, No. 159014; Court of Appeals No. 338395.

PEOPLE v POSEY, No. 159042; Court of Appeals No. 340087.

PEOPLE v WALTERS, No. 159045; Court of Appeals No. 344975.

HARDEN v RUSSELL, No. 159053; Court of Appeals No. 345056.

PEOPLE v FIZER, No. 159058; Court of Appeals No. 338744.

PEOPLE v JOHNS, No. 159059; Court of Appeals No. 346098.

PEOPLE v TILLIE, Nos. 159069, 159070, and 159071; Court of Appeals Nos. 340025, 340026, and 340035.

PEOPLE v DION ANDERSON, No. 159073; Court of Appeals No. 337631.

PEOPLE v KEYONTE LOVE, No. 159090; Court of Appeals No. 340403.

PEOPLE v PIFER, No. 159099; Court of Appeals No. 345928.

PEOPLE v CARLOS THOMPSON, No. 159116; Court of Appeals No. 339103.

PEOPLE v PLOWMAN, No. 159117; Court of Appeals No. 344780.

PEOPLE v TIBBS, No. 159123; Court of Appeals No. 338867.

PEOPLE v ARGO, No. 159125; Court of Appeals No. 340687.

PEOPLE v DAJUAN WATSON, No. 158135; Court of Appeals No. 338270.

In re ANDERSON, No. 159145; Court of Appeals No. 344588.

PEOPLE v MANWELL, No. 159146; Court of Appeals No. 345620.

PEOPLE v GOODE, No. 159150; Court of Appeals No. 346497.

REID v HURLEY MEDICAL CENTER, No. 159151; Court of Appeals No. 344814.

PEOPLE v ANTHONY JACKSON, No. 159156; Court of Appeals No. 339898.

BERNAICHE v MORGAN, No. 159172; Court of Appeals No. 341228.

PEOPLE v ROYDERRICK COLLIER, No. 159177; Court of Appeals No. 339869.

PEOPLE v CHARLES BROOKS, No. 159185; Court of Appeals No. 338267.

PEOPLE v MANSEL WILLIAMS, No. 159188; Court of Appeals No. 346619.

PEOPLE v HARDEN, Nos. 159190 and 159191; Court of Appeals Nos. 346095 and 346521.

PEOPLE v HILDAGO, No. 159208; Court of Appeals No. 346543.

PEOPLE v NATHAN WILSON, No. 159209; Court of Appeals No. 345206.

PEOPLE v ANTOINE WILLIAMS, No. 159210; Court of Appeals No. 339770.

HIGHTOWER v NUYEN, No. 159217; Court of Appeals No. 340637.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, PC.

PEOPLE v LEON JOHNSON, No. 159228; Court of Appeals No. 346621.

PEOPLE v QUANDRAIKO HAYES, No. 159230; Court of Appeals No. 339563.

PEOPLE v JEROME, No. 159241; Court of Appeals No. 339404.

PEOPLE v FEUSS, No. 159253; Court of Appeals No. 337190.

GRIEVANCE ADMINISTRATOR v CHABAN, No. 159290.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

PEOPLE v KINGSLAND, Nos. 159294 and 159295; Court of Appeals Nos. 339064 and 340176.

BURKS v INDEPENDENT BANK, No. 159317; Court of Appeals No. 341008.

PEOPLE v CARTER, No. 159318; Court of Appeals No. 326442.

PEOPLE v BROWN-PEGUES, No. 159345; Court of Appeals No. 342765.

Superintending Control Denied May 28, 2019:

BRINSON v ATTORNEY GRIEVANCE COMMISSION, No. 158648.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

KENT v ATTORNEY GRIEVANCE COMMISSION, No. 159010.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

ZIMMER v ATTORNEY GRIEVANCE COMMISSION, No. 159143.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied May 28, 2019:

PEOPLE v KUZMA, No. 156587; Court of Appeals No. 337913. Leave to appeal denied at 503 Mich 893.

PEOPLE v CLAY, No. 156990; Court of Appeals No. 339081. Leave to appeal denied at 503 Mich 857.

PEOPLE v DEBERRY, No. 157558; Court of Appeals No. 339974. Leave to appeal denied at 503 Mich 886.

PEOPLE v WITBRODT, No. 157689; Court of Appeals No. 341671. Leave to appeal denied at 503 Mich 945.

PEOPLE v HURT, No. 157917; Court of Appeals No. 342120. Leave to appeal denied at 503 Mich 998.

CROWN ENTERPRISES, INC v STATE OF MICHIGAN, No. 157971; Court of Appeals No. 340039. Leave to appeal denied at 503 Mich 929.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

In re MANWELL, No. 157985; Court of Appeals No. 341965. Leave to appeal denied at 503 Mich 945.

PEOPLE v JONNIE JOHNSON, No. 157994; Court of Appeals No. 340950. Leave to appeal denied at 503 Mich 946.

PEOPLE v GUILE, No. 158083; Court of Appeals No. 341529. Leave to appeal denied at 503 Mich 954.

PEOPLE v ORLANDO MITCHELL, No. 158140; Court of Appeals No. 341206. Leave to appeal denied at 503 Mich 946.

PEOPLE v SWITZER, No. 158157; Court of Appeals No. 341237. Leave to appeal denied at 503 Mich 946.

PEOPLE v COOPER, No. 158167; Court of Appeals No. 336662. Leave to appeal denied at 503 Mich 946.

FEDERAL NATIONAL MORTGAGE ASSOCIATION v BRUKWINSKI, No. 158299; Court of Appeals No. 343969. Leave to appeal denied at 503 Mich 932.

PEOPLE v CAUSEY, No. 158380; Court of Appeals No. 343584. Leave to appeal denied at 503 Mich 948.

PEOPLE v MOTT, No. 158419; Court of Appeals No. 338923. Leave to appeal denied at 503 Mich 948.

Summary Disposition May 29, 2019:

PEOPLE v PEERY, No. 158471; Court of Appeals No. 344325. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether MCL 768.7a authorized the trial court to require the sentences

in this case to run consecutively with the defendant's sentence for violating probation in an earlier case. On remand, the Court of Appeals shall address: (1) whether the definition of "prison" found in MCL 750.193(2) controls whether a facility is a "penal or reformatory institution" for purposes of MCL 768.7a(1), even though the two statutes appear in different codes, compare *People v Johnson*, 96 Mich App 84, 86-88 (1980), and *People v Parker*, 319 Mich App 410 (2017), with *People v Washington*, 501 Mich 342, 357 (2018); (2) if so, whether the Kalamazoo Probation Enhancement Program (KPEP) falls within that definition of "prison"; and (3) if not, whether the Legislature intended for a program like KPEP to be treated as a "penal or reformatory institution" for purposes of MCL 768.7a. In all other respects, leave to appeal is denied.

PEOPLE V FAULKNER, No. 158731; Court of Appeals No. 344889. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the March 22, 2018 order of the Wayne Circuit Court. Contrary to the trial court's findings, the motion for relief from judgment is based in part on affidavits that were not previously presented to the trial court. Therefore, we remand this case to the trial court for reconsideration of the defendant's September 18, 2017 motion for relief from judgment as it relates to the affidavits. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Leave to Appeal Denied May 29, 2019:

PEOPLE V ROCAFORT, No. 157269; Court of Appeals No. 321804.

PEOPLE V MICHAEL PATRICK, No. 157735; Court of Appeals No. 340779.

SMAIL V MERCEDES-BENZ USA, LLC, Nos. 158321 and 158322; Court of Appeals Nos. 337709 and 338326.

PEOPLE V CZUPRYNSKI, No. 158416; reported below: 325 Mich App 449.

PEOPLE V LANGEVIN, No. 158438; Court of Appeals No. 344403.

TUDOR INSURANCE COMPANY V PM SERVICES, INC, No. 158711; Court of Appeals No. 335841.

PEOPLE V LUCAS, No. 158746; Court of Appeals No. 339389.

MARKMAN, J. (*concurring*). I concur in the order denying leave to appeal. However, I write separately to, once again, "call to the attention of the Legislature what I believe may be the effective nullification of its mandatory minimum sentence for certain first-degree criminal sexual conduct (CSC-I) offenses set forth in MCL 750.520b(2)(b)." *People v Keefe*, 498 Mich 962, 962 (2015) (MARKMAN, J., concurring). In the present case, defendant was alleged to have engaged in penetration with a person under 13 years of age. Prior to trial, defendant waived his right to a jury trial in exchange for the prosecutor's promise not to pursue the 25-year mandatory minimum sentence that is required for a conviction under MCL 750.520b(2)(b). Defendant was subsequently convicted of

two counts of CSC-I and was sentenced to two concurrent prison terms of 10 to 30 years, in accordance with the agreement between defendant and the prosecutor. I continue to believe that as a result of prosecutor-defendant agreements such as this one, "there is no longer any real mandatory minimum sentence for the class of criminal sexual conduct offenses at issue—those involving interactions between persons 17 years of age or older and those under the age of 13." *Keefe*, 498 Mich at 965 (MARKMAN, J., concurring). Once again, the Legislature may or may not wish to "review MCL 750.520b(2)(b) to ascertain whether the outcome of this case is in accordance with its intentions." *Id*.

ALDRICH v OHM SPECIALTY PHARMACY, LLC, No. 158778; Court of Appeals No. 338140.

PEOPLE v LIMON, No. 158894; Court of Appeals No. 344226.

Rehearing Denied May 29, 2019:

PEOPLE v MEAD, No. 156376; reported below: 320 Mich App 613. Opinion at 503 Mich 205.

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

Leave to Appeal Denied May 31, 2019:

HAZEN v PHILLIS, No. 159225; Court of Appeals No. 345880.

In re PROCTOR-BRISCOE, MINORS, No. 159464; Court of Appeals No. 345231.

Special Orders

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Order Entered September 20, 2018:

PROPOSED ADMINISTRATIVE ORDER TO REQUIRE CIRCUIT JUDGES AND COUNTY CLERKS TO ENTER INTO AN AGREEMENT ON THE ASSIGNMENT AND PERFORMANCE OF MINISTERIAL DUTIES.

On order of the Court, the proposed Administrative Order to Require Circuit Judges and County Clerks to Enter into an Agreement on the Assignment and Performance of Ministerial Duties having been published for comment at 501 Mich 1248 (2018), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to enter an administrative order. This administrative file is closed without further action.

Order Entered September 27, 2018:

PROPOSED AMENDMENTS OF MCR 1.109, 2.102, 2.104, 2.106, 2.107, 2.117, 2.119, 2.403, 2.503, 2.506, 2.508, 2.518, 2.602, 2.603, 2.621, 3.101, 3.104, 3.203, 3.205, 3.210, 3.302, 3.607, 3.613, 3.614, 3.705, 3.801, 3.802, 3.805, 3.806, 4.201, 4.202, 4.303, 4.306, 5.001, 5.104, 5.105, 5.107, 5.108, 5.113, 5.117, 5.118, 5.119, 5.120, 5.125, 5.126, 5.132, 5.162, 5.202, 5.203, 5.205, 5.302, 5.304, 5.307, 5.308, 5.309, 5.310, 5.311, 5.313, 5.402, 5.404, 5.405, 5.409, 5.501, AND 5.784 AND PROPOSED ADOPTION OF MCR 3.618.

On order of the Court, this is to advise that the Court is considering amendments of Rules 1.109, 2.102, 2.104, 2.106, 2.107, 2.117, 2.119, 2.403, 2.503, 2.506, 2.508, 2.518, 2.602, 2.603, 2.621, 3.101, 3.104, 3.203, 3.205, 3.210, 3.302, 3.607, 3.613, 3.614, 3.705, 3.801, 3.802, 3.805, 3.806, 4.201, 4.202, 4.303, 4.306, 5.001, 5.104, 5.105, 5.107, 5.108, 5.113, 5.117, 5.118, 5.119, 5.120, 5.125, 5.126, 5.132, 5.162, 5.202, 5.203, 5.205, 5.302, 5.304, 5.307, 5.308, 5.309, 5.310, 5.311, 5.313, 5.402, 5.404, 5.405, 5.409, 5.501, and 5.784 and new rule 3.618 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Rule 3.618 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1)-(2) [Unchanged.]

(3) Scope and Applicability.

(a)-(e) [Unchanged.]

(f) For the required case types, attorneys must electronically file documents in courts where electronic filing has been implemented. All other filers are required to electronically file documents only in courts that have been granted approval to mandate electronic filing by the State Court Administrative Office under AO 2018-XX.

(4) [Unchanged.]

(5) Electronic-Filing Process.

(a) [Unchanged.]

(b) Time and Effect of Electronic Filing. A document submitted electronically is deemed filed with the court when the transmission to the electronic-filing system is completed and the required filing fees have been paid or waived. If a document is submitted with a request to waive the filing fees, the document is deemed filed on the date the document was submitted to the court. A transmission is completed when the transaction is recorded as prescribed in subrule (c). Regardless of the date a filing is accepted by the clerk of the court, the date of filing is the date submitted. Electronic filing is not restricted by the operating hours of a court and any document submitted at or before 11:59 p.m. of a business day is deemed filed on that business day. Any document submitted on a weekend, legal holiday, or day on which the court is closed pursuant to court order~~court holiday~~ is deemed filed on the next business day.

(c)-(d) [Unchanged.]

(6)-(7) [Unchanged.]

RULE 2.102. SUMMONS; EXPIRATION OF SUMMONS; DISMISSAL OF ACTION FOR FAILURE TO SERVE.

(A) [Unchanged.]

(B) Form. A summons must be issued "In the name of the people of the State of Michigan," under the seal of the court that issued it. It must be directed to the defendant, and include

(1)-(2) [Unchanged.]

(3) the ~~file~~case number,

(4)-(11) [Unchanged.]

(C) [Unchanged.]

(D) Expiration. A summons expires 91 days after the date the ~~complaint is filed~~summons is issued. However, within those 91 days, on a showing of due diligence by the plaintiff in attempting to serve the

original summons, the judge to whom the action is assigned may order a second summons to issue for a definite period not exceeding 1 year from the date the ~~complaint is filed~~summons is issued. If such an extension is granted, the new summons expires at the end of the extended period. The judge may impose just conditions on the issuance of the second summons. Duplicate summonses issued under subrule (A) do not extend the life of the original summons. The running of the 91-day period is tolled while a motion challenging the sufficiency of the summons or of the service of the summons is pending.

(E)-(G) [Unchanged.]

RULE 2.104. PROCESS; PROOF OF SERVICE.

(A) Requirements. Proof of service may be made by

(1)-(2) [Unchanged.]

(3) a~~n affidavit stating~~written statement of the facts of service, verified under MCR 1.109(D)(3). The statement shall includ~~eing~~ the manner, time, date, and place of service, and indicat~~eing~~ the process server's official capacity, if any.

The place of service must be described by giving the address where the service was made or, if the service was not made at a particular address, by another description of the location.

(B)-(C) [Unchanged.]

RULE 2.106. NOTICE BY POSTING OR PUBLICATION.

(A)-(F) [Unchanged.]

(G) Proof of Service. Service of process made pursuant to this rule may be proven as follows:

(1) [Unchanged.]

(2) Posting must be proven by a~~n affidavit~~verified statement of the person designated in the order under subrule (E) attesting that a copy of the order was posted for the required time in the courthouse in a conspicuous place open to the public and in the other places as ordered by the court.

(3) Mailing must be proven by ~~affidavit~~a verified statement. The affiant must attach a copy of the order as mailed, and a return receipt.

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER DOCUMENTS.

(A) Service; When Required.

(1) Unless otherwise stated in this rule, every party who has filed a pleading, an appearance, or a motion must be served with a copy of every ~~paper~~document later filed in the action. A nonparty who has filed a motion or appeared in response to a motion need only be served with ~~papers~~documents that relate to that motion.

(2) Except as provided in MCR 2.603, after a default is entered against a party, further service of ~~papers~~documents need not be made on that party unless he or she has filed an appearance or a written demand for service of ~~papers~~documents. However, a pleading that states a new claim for relief against a party in default must be served in the manner provided by MCR 2.105.

(3) [Unchanged.]

(4) All ~~papers~~documents filed on behalf of a defendant must be served on all other defendants not in default.

(B) Service on Attorney or Party.

(1) Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:

(a)-(b) [Unchanged.]

(c) After a final judgment or final order has been entered and the time for an appeal of right has passed, ~~papers~~documents must be served on the party unless the rule governing the particular postjudgment procedure specifically allows service on the attorney;

(d) [Unchanged.]

(e) If an attorney files a notice of limited appearance under MCR 2.117 on behalf of a self-represented party, service of every ~~paper~~document later filed in the action must continue to be made on the party, and must also be made on the limited scope attorney for the duration of the limited appearance. At the request of the limited scope attorney, and if circumstances warrant, the court may order service to be made only on the party.

(2) If two or more attorneys represent the same party, service of ~~papers~~documents on one of the attorneys is sufficient. An attorney who represents more than one party is entitled to service of only one copy of a ~~paper~~document.

(3) If a party prosecutes or defends the action on his or her own behalf, service of ~~papers~~documents must be made on the party in the manner provided by subrule (C).

(C) Manner of Service. Except under MCR 1.109(G)(6)(a), ~~S~~service of a copy of a ~~paper~~document on an attorney must be made by delivery or by mailing to the attorney at his or her last known business address or, if the attorney does not have a business address, then to his or her last known residence address. Except under MCR 1.109(G)(6)(a), ~~S~~service on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings.

(1) Delivery to Attorney. Delivery of a copy to an attorney within this rule means

(a) handing it to the attorney personally, serving it electronically under MCR 1.109(G)(6)(a), or, if agreed to by the parties, e-mailing it to the attorney as allowed under MCR 2.107(C)(4);

(b)-(c) [Unchanged.]

(2) Delivery to Party. Delivery of a copy to a party within this rule means

(a) handing it to the party personally, serving it electronically under MCR 1.109(G)(6)(a), or, if agreed to by the parties, e-mailing it to the party as allowed under MCR 2.107(C)(4); or

(b) [Unchanged.]

(3) [Unchanged.]

~~(4) E-mail. Some or all of the parties may agree to e-mail service among themselves by filing a stipulation in that case. Some or all of the~~

parties may agree to e-mail service by a court by filing an agreement with the court to do so. E-mail service shall be subject to the following conditions:

(a) The stipulation or agreement for service by e-mail shall set forth the e-mail addresses of the parties or attorneys that agree to e-mail service, which shall include the same e-mail address currently on file with the State Bar of Michigan. If an attorney is not a member of the State Bar of Michigan, the e-mail address shall be the e-mail address currently on file with the appropriate registering agency in the state of the attorney's admission. Parties and attorneys who have stipulated or agreed to service by e-mail under this subsection shall immediately notify all other parties and the court if the party's or attorney's e-mail address changes.

(b) The parties shall set forth in the stipulation or agreement all limitations and conditions concerning e-mail service, including but not limited to:

(i) the maximum size of the document that may be attached to an e-mail;

(ii) designation of exhibits as separate documents;

(iii) the obligation (if any) to furnish paper copies of e-mailed documents; and

(iv) the names and e-mail addresses of other individuals in the office of an attorney of record designated to receive e-mail service on behalf of a party.

(c) Documents served by e-mail must be in PDF format or other format that prevents the alteration of the document contents.

(d) A paper served by e-mail that an attorney is required to sign may include the attorney's actual signature or a signature block with the name of the signatory accompanied by "s/" or "/s/." That designation shall constitute a signature for all purposes, including those contemplated by MCR 2.114(C) and (D).

(e) Each e-mail that transmits a document shall include a subject line that identifies the case by court, party name, case number, and the title or legal description of the document(s) being sent.

(f) An e-mail transmission sent after 4:30 p.m. Eastern Time shall be deemed to be served on the next day that is not a Saturday, Sunday, or legal holiday. Service by e-mail under this subrule is treated as service by delivery under MCR 2.107(C)(1).

(g) A party may withdraw from a stipulation or agreement for service by e-mail if that party notifies the other party or parties and the court in writing at least 28 days in advance of the withdrawal.

(h) Service by e-mail is complete upon transmission, unless the party making service learns that the attempted service did not reach the e-mail address of the intended recipient. If an e-mail is returned as undeliverable, the party, attorney, or court must serve the paper or other document by regular mail under MCR 2.107(C)(3), and include a copy of the return notice indicating that the e-mail was undeliverable. A party, attorney, or court must also retain a notice that the e-mail was undeliverable.

~~(i) The e-mail sender shall maintain an archived record of sent items that shall not be purged until the conclusion of the case, including the disposition of all appeals.~~

(4) Alternative Electronic Service

(a) Except as provided by MCR 1.109(G)(6)(a)(ii), the parties may agree to alternative electronic service among themselves by filing a stipulation in that case. Some or all of the parties may also agree to alternative electronic service of notices and court documents by a court or a friend of the court by filing an agreement with the court or friend of the court. Alternative electronic service may be by any of the following methods:

(i) e-mail,

(ii) text message, or

(iii) sending an e-mail or text message to log into a secure website to view notices and court papers.

(b) Obligation to Provide and Update Information.

(i) The agreement for alternative electronic service shall set forth the e-mail addresses or phone numbers for service. Attorneys who agree to e-mail service shall include the same e-mail address currently on file with the State Bar of Michigan. If an attorney is not a member of the State Bar of Michigan, the e-mail address shall be the e-mail address currently on file with the appropriate registering agency in the state of the attorney's admission. Parties or attorneys who have agreed to alternative electronic service under this subrule shall immediately notify the court or the friend of the court if the e-mail address or phone number for service changes.

(ii) The agreement for service by text message or text message alert shall set forth the phone number for service. Parties or attorneys who have agreed to service by text message or text message alert under this subrule shall immediately notify the court or the friend of the court if the phone number for service changes.

(c) The party or attorney shall set forth in the agreement all limitations and conditions concerning e-mail or text message service, including but not limited to:

(i) the maximum size of the document that may be attached to an e-mail or text message,

(ii) designation of exhibits as separate documents,

(iii) the obligation (if any) to furnish paper copies of e-mailed or text message documents, and

(iv) the names and e-mail addresses of other individuals in the office of an attorney of record designated to receive e-mail service on behalf of a party.

(d) Documents served by e-mail or text message must be in PDF format or other format that prevents the alteration of the document contents. Documents served by alert must be in PDF format or other format for which a free downloadable reader is available.

(e) A document served by alternative electronic service that the court or friend of the court or his or her authorized designee is required to sign may be signed in accordance with MCR 1.109(E).

(f) Each e-mail or text message that transmits a document or provides an alert to log in to view a document shall identify in the e-mail subject line or at the beginning of the text message the name of the court, case name, case number, and the title of each document being sent.

(g) An alternative electronic service transmission sent at or before 11:59 p.m. shall be deemed to be served on that day. If the transmission is sent on a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order, it is deemed to be served on the next business day.

(h) A party or attorney may withdraw from an agreement for alternative electronic service by notifying the party or parties, court, and the friend of the court, as appropriate, in writing at least 28 days in advance of the withdrawal.

(i) Alternative electronic service is complete upon transmission, unless the party, court, or friend of the court making service learns that the attempted service did not reach the intended recipient. If an alternative electronic service transmission is undeliverable, the entity responsible for serving the document must serve the document by regular mail under MCR 2.107(C)(3), and include a copy of the return notice indicating that the electronic transmission was undeliverable. The court or friend of the court must also retain a notice that the electronic transmission was undeliverable.

(j) The party, court, or friend of the court shall maintain an archived record of sent items that shall not be purged until a judgment or final order is entered and all appeals have been completed.

(k) This rule does not require the court or the friend of the court to create functionality it does not have nor accommodate more than one standard for alternative electronic service.

(D) [Unchanged.]

(E) Service Prescribed by Court. When service of ~~papers~~documents after the original complaint cannot reasonably be made because there is no attorney of record, because the party cannot be found, or for any other reason, the court, for good cause on ex parte application, may direct in what manner and on whom service may be made.

(F) Numerous Parties. In an action in which there is an unusually large number of parties on the same side, the court on motion or on its own initiative may order that

(1) they need not serve their ~~papers~~documents on each other;

(2)-(4) [Unchanged.]

A copy of the order must be served on all parties in the manner the court directs.

RULE 2.117. APPEARANCES.

(A) Appearance by Party.

(1) A party may appear in an action by filing a notice to that effect or by physically appearing before the court for that purpose. In the latter event, the party must promptly file a written appearance and serve it on all persons entitled to service. ~~The party's address and telephone number must be included in the appearance.~~

(2) Filing an appearance without taking any other action toward prosecution or defense of the action neither confers nor enlarges the jurisdiction of the court over the party. An appearance entitles a party to ~~receive copies of~~be served with all ~~pleadings and papers~~documents as provided by MCR 2.107(A). In all other respects, the party is treated as if the appearance had not been filed.

(B) Appearance by Attorney.

(1) [Unchanged.]

(2) Notice of Appearance.

(a) If an appearance is made in a manner not involving the filing of a ~~paper~~document with the court, the attorney must promptly file a written appearance and serve it on the parties entitled to service. ~~The attorney's address and telephone number must be included in the appearance.~~

(b) If an attorney files an appearance, but takes no other action toward prosecution or defense of the action, the appearance entitles the attorney to ~~service of pleadings and papers~~be served with all documents as provided by MCR 2.107(A).

(c)-(d) [Unchanged.]

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other ~~paper~~document filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a ~~paper~~document in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered, or a confirming notice of withdrawal of a notice of limited appearance is filed as provided by subrule (C)(3). This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the party.

(b) [Unchanged.]

(C) [Unchanged.]

(D) Nonappearance of Attorney Assisting in Document Preparation. An attorney who assists in the preparation of pleadings or other ~~papers~~documents without signing them, as authorized in MRPC 1.2(b), has not filed an appearance and shall not be deemed to have done so. This provision shall not be construed to prevent the court from investigating issues concerning the preparation of such a ~~paper~~document.

(E) Service of Documents After Removal of Appearance. If an attorney has filed a limited appearance or the attorney is removed from the case for any other reason, the attorney shall not continue to be served with documents in the case after the limited appearance ends or after an order is entered removing the attorney from the case.

RULE 2.119. MOTION PRACTICE.

(A) [Unchanged.]

(B) Form of Affidavits.

(1) [Unchanged.]

(2) Sworn or certified copies of all ~~papers~~documents or parts of ~~papers~~documents referred to in an affidavit must be attached to the affidavit unless the ~~papers or copies~~documents:

(a)-(d) [Unchanged.]

(C) Time for Service and Filing of Motions and Responses.

(1) Unless a different period is set by these rules or by the court for good cause, a written motion (other than one that may be heard ex parte), notice of the hearing on the motion, and any supporting brief or affidavits must be served as follows:

(a) at least 9 days before the time set for the hearing, if served by first-class mail, or

(b) at least 7 days before the time set for the hearing, if served by delivery under MCR 2.107(C)(1) or (2) or MCR 1.109(G)(6)(a).

(2) Unless a different period is set by these rules or by the court for good cause, any response to a motion (including a brief or affidavits) required or permitted by these rules must be served as follows:

(a) at least 5 days before the hearing, if served by first-class mail, or

(b) at least 3 days before the hearing, if served by delivery under MCR 2.107(C)(1) or (2) or MCR 1.109(G)(6)(a).

(3)-(4) [Unchanged.]

(D)-(G) [Unchanged.]

RULE 2.403. CASE EVALUATION.

(A)-(J) [Unchanged.]

(K) Decision.

(1) Within 14 days after the hearing, the panel will make an evaluation and ~~notify~~submit the evaluation to the court. If an evaluation is made immediately following the hearing, the panel will provide a copy to the attorney for each party of its evaluation in writing. If an evaluation is not made immediately following the hearing, the evaluation must be served by the ADR clerk on each party within 14 days after the hearing. If an award is not unanimous, the evaluation must so indicate.

(2)-(5) [Unchanged.]

(L)-(O) [Unchanged.]

RULE 2.503. ADJOURNMENTS.

(A)-(C) [Unchanged.]

(D) Order for Adjournment; Costs and Conditions.

(1) [Unchanged.]

(2) In granting an adjournment, the court may impose costs and conditions. When an adjournment is granted conditioned on payment of costs, the costs may be taxed summarily to be paid on demand of the adverse party or the adverse party's attorney, and the adjournment may be vacated if nonpayment is shown by ~~affidavit~~written statement verified under MCR 1.109(D)(3).

(E)-(F) [Unchanged.]

RULE 2.506. SUBPOENA; ORDER TO ATTEND.

(A) [Unchanged.]

(B) Authorized Signatures.

(1) [Unchanged.]

(2) For the purpose of this subrule, an authorized signature includes but is not limited to signatures written by hand, printed, stamped, typewritten, engraved, photographed, ~~or~~ lithographed, or executed under MCR 1.109(E)(4).

(C)-(I) [Unchanged.]

RULE 2.508. JURY TRIAL OF RIGHT.

(A) [Unchanged.]

(B) Demand for Jury.

(1) A party may demand a trial by jury of an issue as to which there is a right to trial by jury by filing a written demand for a jury trial within 28 days after the filing of the answer or a timely reply. The demand for jury must be filed as a separate document.~~A party may include the demand in a pleading if notice of the demand is included in the caption of the pleading.~~ The jury fee provided by law must be paid at the time the demand is filed.

(2)-(3) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 2.518. RECEIPT AND RETURN OR DISPOSAL OF EXHIBITS.

(A) Receipt of Exhibits. Except as otherwise required by statute or court rule, materials that are intended to be used as evidence at or during a trial shall not be filed with the clerk of the court, but shall be submitted to the judge for introduction into evidence as exhibits. Exhibits introduced into evidence at or during court proceedings shall be received and maintained as provided by Michigan Supreme Court trial court ~~case file~~records management standards. As defined in MCR 1.109, exhibits received and accepted into evidence under this rule are not court records.

(B)-(C) [Unchanged.]

RULE 2.602. ENTRY OF JUDGMENTS AND ORDERS.

(A) Signing; Statement; Date of Entry.

(1) Except as provided in this rule and in MCR 2.603, all judgments and orders must be in writing, signed by the court, and dated with the date they are signed.

(2)-(3) [Unchanged.]

(4) Where electronic filing is implemented, judgments and orders must be issued under the seal of the court.

(B) Procedure of Entry of Judgments and Orders. An order or judgment shall be entered by one of the following methods:

(1)-(2) [Unchanged.]

(3) Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the notice and

proof of service along with~~original of~~ the proposed judgment or order ~~and proof of its service on the other parties~~.

(a) If no written objections are filed within 7 days of the date of service of the notice, the ~~clerk shall submit the judgment or order to the court, and the court~~judge shall ~~then~~ sign ~~it~~the judgment or order if, in the court's determination, it comports with the court's decision. If the proposed judgment or order does not comport with the decision, the court shall direct the clerk to notify the parties to appear before the court on a specified date for settlement of the matter.

(b)-(c) [Unchanged.]

(d) The court must schedule the hearing upon filing of the first objection. Other parties to the action may file objections with the court through the end of the 7-day period. The court must schedule a hearing for all objections within 14 days after the first objection is filed or as soon as is practical afterward.

(4) A party may prepare a proposed judgment or order and notice it for settlement before the court. A court shall not charge a motion fee if the order is dispositive except as directed in 2.116(B)(1), 2.603(B)(3) and 3.210(B)(4).

(C) [Unchanged.]

(D) ~~Filing~~Placement in Case File. The ~~original of the~~signed judgment or order must be placed in the case file.

(E) [Unchanged.]

RULE 2.603. DEFAULT AND DEFAULT JUDGMENT.

(A) Entry of Default; Notice; Effect.

(1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is ~~made to appear by affidavit or otherwise~~filed with the court in a request verified in the manner prescribed by MCR 1.109(D)(3), the clerk must enter the default of that party.

(2) Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.

~~(a) In the district court, the court clerk shall send the notice.~~

~~(b) In all other courts, t~~The notice must be sent by the party who sought entry of the default. Proof of service and a copy of the notice must be filed with the court.

(3) ~~Once~~After the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612.

(B) Default Judgment.

(1) [Unchanged.]

(2) Default Judgment Entered by Clerk. On written request of the plaintiff ~~supported by an affidavit~~verified under MCR 1.109(D)(3) as to the amount due, the clerk may sign and enter a default judgment for that amount and costs against the defendant, if

(a) [Unchanged.]

(b) the default was entered because the defendant failed to appear; ~~and~~

(c) the defaulted defendant is not an infant or incompetent person; and

(d) [Unchanged.]

(3) [Unchanged.]

(4) Notice of Entry of Default Judgment. The ~~court clerk must promptly mail notice of entry of a default judgment to~~party who sought entry of the default judgment must promptly serve all parties with the default judgment. The ~~notice to the defendant~~default judgment shall be mailed to the defendant's last known address or the address of the place of service. ~~The clerk must keep a record that notice was given~~Proof of service must be filed with the court.

(C) [Unchanged.]

(D) Setting Aside Default or Default Judgment.

(1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and ~~an affidavit~~a verified statement of facts showing a meritorious defense is filed.

(2)-(4) [Unchanged.]

(E) [Unchanged.]

RULE 2.621. PROCEEDINGS SUPPLEMENTARY TO JUDGMENT.

(A)-(G) [Unchanged.]

(H) Appeal; Procedure; Bonds. A final order entered in a supplementary proceeding may be appealed in the usual manner. The appeal is governed by the provisions of chapter 7 of these rules except as modified by this subrule.

(1)-(2) [Unchanged.]

(3) If the order appealed from directs the assignment or delivery of ~~papers or~~ documents by the appellant, the ~~papers~~documents must be delivered to the clerk of the court in which the proceeding is pending or placed in the hands of an officer or receiver, as the judge who entered the order directs, to await the appeal, subject to the order of the appellate courts.

(4) [Unchanged.]

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(G) [Unchanged.]

(H) Disclosure. The garnishee shall ~~mail or deliver to~~file with the court~~,~~ and deliver to the plaintiff~~,~~ and ~~the~~ defendant, a verified disclosure within 14 days after being served with the writ.

(1)-(2) [Unchanged.]

(I)-(T) [Unchanged.]

RULE 3.104. INSTALLMENT PAYMENT ORDERS.

(A) Motion for Installment Payment Order. A party against whom a money judgment has been entered may move for entry of an order

permitting the judgment to be paid in installments in accordance with MCL 600.6201 *et seq*. A copy of the motion must be served on the plaintiff~~, by the clerk of the court in district court and~~ by the party who filed the objection ~~in circuit or probate court~~.

(B) Consideration of Motion. The motion will be granted without further hearing unless the plaintiff files, and serves on the defendant, written objections within 14 days after the service date of the defendant's motion. If objections are filed, the clerk must promptly present the motion and objections to the court. The court will decide the motion based on the ~~papers~~documents filed or notify the parties that a hearing will be required. Unless the court schedules the hearing, the moving party is responsible for noticing the motion for hearing.

(C)-(D) [Unchanged.]

RULE 3.203. SERVICE OF NOTICE AND COURT ~~PAPERS~~DOCUMENTS IN DOMESTIC RELATIONS CASES.

(A) Manner of Service. Unless otherwise required by court rule or statute, the summons and complaint must be served pursuant to MCR 2.105. In cases in which the court retains jurisdiction

(1) [Unchanged.]

(2) court ~~papers~~documents and notice for which the statute or court rule does not specify the manner of service must be served as provided in MCR 2.107, except that service by mail shall be to a party's last known mailing address.

(3) Alternative Electronic Service

(a) A party or an attorney may file an agreement with the friend of the court to authorize the friend of the court to serve notices and court papers on the party or attorney in accordance with MCR 2.107(C)(4)~~, by any of the following methods:~~

~~(i) e-mail;~~

~~(ii) text message;~~

~~(iii) sending an e-mail or text message alert to log into a secure website to view notices and court papers.~~

~~(b) Obligation to Provide and Update Information~~

~~(i) The agreement for service by e-mail or e-mail alert shall set forth the e-mail addresses for service. Attorneys who agree to e-mail service shall include the same email address currently on file with the State Bar of Michigan. If an attorney is not a member of the State Bar of Michigan, the e-mail address shall be the e-mail address currently on file with the appropriate registering agency in the state of the attorney's admission. Parties or attorneys who have agreed to service by e-mail or email alert under this subsection shall immediately notify the friend of the court if the e-mail address for service changes.~~

~~(ii) The agreement for service by text message or text message alert shall set forth the phone number for service. Parties or attorneys who have agreed to service by text message or text message alert under this subsection shall immediately notify the friend of the court if the phone number for service changes.~~

~~(c) The party or attorney shall set forth in the agreement all limitations and conditions concerning e-mail or text message service, including but not limited to:~~

~~(i) the maximum size of the document that may be attached to an e-mail or text message;~~

~~(ii) designation of exhibits as separate documents;~~

~~(iii) the obligation (if any) to furnish paper copies of emailed or text message documents; and~~

~~(iv) the names and e-mail addresses of other individuals in the office of an attorney of record designated to receive e-mail service on behalf of a party.~~

~~(d) Documents served by e-mail or text message must be in PDF format or other format that prevents the alteration of the document contents. Documents served by alert must be in PDF format or other format for which a free downloadable reader is available.~~

~~(e) A paper served by alternative electronic service that the friend of the court or an authorized designee is required to sign may include the actual signature or a signature block with the name of the signatory accompanied by "s/" or "/s/." That designation shall constitute a signature for all purposes, including those contemplated by MCR 2.114(C) and (D).~~

~~(f) Each e-mail or text message that transmits a document or provides an alert to log in to view a document shall identify in the e-mail subject line or at the beginning of the text message the case by court, party name, case number, and the title or legal description of the document(s) being sent.~~

~~(g) An alternative electronic service transmission sent after 4:30 p.m. Eastern Time shall be deemed to be served on the next day that is not a Saturday, Sunday, or legal holiday. Service under this subrule is treated as service by delivery under MCR 2.107(C)(1).~~

~~(h) A party or attorney may withdraw from an agreement for alternative electronic service by notifying the friend of the court in writing at least 28 days in advance of the withdrawal.~~

~~(i) Alternative electronic service is complete upon transmission, unless the friend of the court learns that the attempted service did not reach the intended recipient. If an alternative electronic service transmission is undeliverable, the friend of the court must serve the paper or other document by regular mail under MCR 2.107(C)(3), and include a copy of the return notice indicating that the electronic transmission was undeliverable. The friend of the court must also retain a notice that the electronic transmission was undeliverable.~~

~~(j) The friend of the court shall maintain an archived record of sent items that shall not be purged until a judgment or final order is entered and all appeals have been completed.~~

~~(k) This rule does not require the friend of the court to create functionality it does not have nor accommodate more than one standard for alternative electronic service.~~

(B)-(C) [Unchanged.]

(D) Administrative Change of Address. The friend of the court office may change a party's address administratively pursuant to the policy established by the state court administrator for that purpose when:

(1) [Unchanged.]

(2) notices and court ~~papers~~documents are returned to the friend of the court office as undeliverable or the friend of the court determines that a federal automated database has determined that mail is not deliverable to the party's listed address.

(E) Service on Nonparties. Notice to a nonparty must be provided as set forth in the statute requiring the notice. Absent statutory direction, the notice may be provided by regular mail. Absent statutory direction, court ~~papers~~documents initiating an action against nonparties to enforce a notice must be served in the same manner as a summons and complaint pursuant to MCR 2.105.

(F) Confidential Addresses. When a court order makes a party's address confidential, the party shall provide an alternative address for service of notice and court ~~papers~~documents.

(G) Notice to Friend of the Court. Except where electronic filing is implemented, ~~I~~if a child of the parties or a child born during the marriage is under the age of 18, or if a party is pregnant, or if child support or spousal support is requested, the parties must provide the friend of the court with a copy of all pleadings and other ~~papers~~documents filed in the action. The copy must be marked "friend of the court" and submitted to the court clerk at the time of filing. The court clerk must send the copy to the friend of the court. Where electronic filing is implemented, the court and the friend of the court shall determine the manner in which pleadings and other documents filed in the action will be made available to the friend of the court.

(H) Notice to Prosecuting Attorney. In an action for divorce or separate maintenance in which a child of the parties or a child born during the marriage is under the age of 18, or if a party is pregnant, the plaintiff must serve a copy of the summons and complaint on the prosecuting attorney when required by law. ~~Service must be made at the time of filling by providing the court clerk with an additional copy marked "prosecuting attorney". The court clerk must send the copy to the prosecuting attorney.~~

(I)-(J) [Unchanged.]

RULE 3.205. PRIOR AND SUBSEQUENT ORDERS AND JUDGMENTS AFFECTING MINORS.

(A) [Unchanged.]

(B) Notice to Prior Court, Friend of the Court, Juvenile Officer, and Prosecuting Attorney.

(1) [Unchanged.]

(2) If a minor is known to be subject to the prior continuing jurisdiction of a Michigan court, the plaintiff or other initiating party must ~~mail written~~send notice of proceedings in the subsequent court to ~~the attention of~~

(a)-(b) [Unchanged.]

(3) The notice must be ~~mailed~~sent at least 21 days before the date set

for hearing. If the fact of continuing jurisdiction is not then known, notice must be ~~given~~sent immediately when it becomes known.

(4) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 3.210. HEARINGS AND TRIALS.

(A) [Unchanged.]

(B) Default Cases.

(1) [Unchanged.]

(2) Entry of Default.

(a) A party may request the entry of a default of another party for failure to plead or otherwise defend~~. Upon presentation of an affidavit~~ by ~~a party~~ asserting facts setting forth proof of service and failure to plead or otherwise defend in a written request verified under MCR 1.109(D)(3). On filing of the request, the clerk must enter a default of the party.

(b)-(d) [Unchanged.]

(e) A party in default must be served with the notice of default and a copy of every ~~paper~~document later filed in the case as provided by MCR 3.203, and the person serving the notice or other ~~paper~~document must file a proof of service with the court.

(3)-(7) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 3.302. SUPERINTENDING CONTROL.

(A)-(D) [Unchanged.]

(E) Procedure for Superintending Control in Circuit Court.

(1)-(2) [Unchanged.]

(3) Issuance of Order; Dismissal.

(a)-(b) [Unchanged.]

(c) The court may require in an order to show cause that additional records and ~~papers~~documents be filed.

(d) [Unchanged.]

RULE 3.607. PROCEEDINGS TO RESTORE LOST RECORDS OR ~~PAPERS~~DOCUMENTS IN COURTS OF RECORD.

(A)-(D) [Unchanged.]

RULE 3.613. CHANGE OF NAME.

(A)-(B) [Unchanged.]

(C) Notice to Noncustodial Parent. Service on a noncustodial parent of a minor who is the subject of a petition for change of name shall be made in the following manner.

(1) Address Known. If the noncustodial parent's address or whereabouts is known, that parent shall be served with a copy of the petition and a notice of hearing at least 14 days before the hearing in a manner prescribed by MCR 2.107(C).

(2) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 3.614. HEALTH THREATS TO OTHERS.

(A) [Unchanged.]

(B) Service of ~~Papers~~Documents. The moving party is responsible for service when service is required.

(C)-(E) [Unchanged.]

RULE 3.618. EMANCIPATION OF MINOR.

(A) Interested Persons. The persons interested in a petition for emancipation of a minor are

(1) the minor,

(2) parents of the minor,

(3) the affiant on an affidavit supporting emancipation, and

(4) any guardian or conservator.

(B) Summons.

(1) A summons in an emancipation proceeding must be served on an interested person at least 14 days before the date of hearing unless the interested person has waived his or her right to service.

(2) The summons must direct the person to whom it is addressed to appear at a time and place specified by the court and must identify the nature of hearing.

(C) Manner of Serving Summons and Petition.

(1) Except as provided in subrule (C)(2), a summons and petition for emancipation must be served by personal service.

(2) If service of the summons and petition cannot be made under subrule (C)(1) because the whereabouts of an interested person could not be ascertained after diligent inquiry, the petitioner must file proof of the efforts made to locate the interested person in a statement verified under MCR 1.109(D)(3). If the court finds, on reviewing the statement, that a reasonable attempt was made, the court may issue an ex parte order directing another manner of service reasonably calculated to give notice of the proceedings, including notice by publication under subrule (3).

(3) Service by Publication.

(a) Requirements. A notice of hearing or other notice required to be made by publication must be published in a newspaper as defined by MCR 2.106(F) at least one time 21 days before the date of hearing. Publication shall be in the county in which the court is located.

(b) Contents of Notice. The published notice must include the name of the individual to whom the notice is given, a statement describing the nature of the hearing, and a statement that the hearing may affect the individual's interest in the matter. If an interested person has once been served by publication, notice is only required on an interested person whose address is known or becomes known during the proceedings.

(c) Service of Notice. A copy of the notice shall be mailed to the individual to whom the notice is given at his or her last known address. If the last known address of the individual cannot be ascertained after diligent inquiry, mailing a copy of the notice is not required.

(d) Proof of service under this subrule shall be made according to MCR 2.106(G).

(D) Time of Service.

(1) A summons shall be personally served at least 14 days before hearing on a petition of emancipation, except as allowed under subrule (C)(2).

(2) If the summons is served by registered mail, it must be sent at least 21 days before hearing if the interested person to be served resides in Michigan, or at least 28 days before hearing if the interested person to be served resides outside of Michigan.

(E) Other Service. The clerk of the court shall serve an order issued by the court. If notice of the petition and hearing was given to an interested person by publication, a copy of an order issued by the court need not be served on that interested person.

(F) Proof of Service

(1) Summons and Petition. Proof of service of the summons and petition must be made in the manner provided in MCR 2.104(A).

(2) Other Documents. Proof of service of other documents permitted or required to be served under this rule must be made in the manner provided in MCR 2.107(D).

RULE 3.705. ISSUANCE OF PERSONAL PROTECTION ORDERS.

(A) Ex Parte Orders.

(1) The court must rule on a request for an ex parte order within ~~24 hours~~one business day of the filing date of the petition.

(2)-(5) [Unchanged.]

(B)-(C) [Unchanged.]

RULE 3.801. ~~PAPERS~~DOCUMENTS, EXECUTION.

(A)-(B) [Unchanged.]

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A) Service of ~~Papers~~Documents.

(1) [Unchanged.]

(2) Notice of a petition to identify a putative father and to determine or terminate his rights, or a petition to terminate the rights of a noncustodial parent, must be served on the individual or the individual's attorney in the manner provided in:

(a) MCR ~~5.105(B)(1)(a) or (b)~~2.107(C)(1) or (2), or

(b) MCR 2.105(A)(2), but service is not made for purpose of this subrule until the individual or the individual's attorney receives the notice or petition.

(3) [Unchanged.]

(4) Except as provided in subrules (B) and (C), all other ~~papers~~documents may be served by mail under MCR 2.107(C)(3), e-mail under MCR 2.107(C)(4), or electronic service under MCR 1.109(G)(6)(a).

(B) Service When Identity or Whereabouts of Father is Unascertainable

(1) If service cannot be made under subrule (A)(2) because the identity of the father of a child born out of wedlock or the whereabouts of the identified father has not been ascertained after diligent inquiry, the petitioner must file proof ~~by affidavit or by declaration under MCR~~

~~1.109(D)(3), of the attempt~~of the efforts made to identify or locate the father in a statement verified under MCR 1.109(D)(3). No further service is necessary before the hearing to identify the father and to determine or terminate his rights.

(2) [Unchanged.]

(C) Service When Whereabouts of Noncustodial Parent Is Unascertainable.

If service of a petition to terminate the parental rights of a noncustodial parent pursuant to MCL 710.51(6) cannot be made under subrule (A)(2) because the whereabouts of the noncustodial parent has not been ascertained after diligent inquiry, the petitioner must file proof~~, by affidavit or by declaration under MCR 1.109(D)(3), of the attempt~~ of the efforts made to locate the noncustodial parent in a statement verified under MCR 1.109(D)(3). If the court finds, on reviewing the statement~~affidavit or declaration~~, that service cannot be made because the whereabouts of the person has not been determined after reasonable efforts, the court may direct any manner of substituted service of the notice of hearing, including service by publication.

(D) Service by Publication.

(1) Requirements. A notice of hearing or other notice required to be made by publication must be published in a newspaper as defined by MCR 2.106(F) at least one time 21 days before the date of the hearing. Publication shall be in the county in which the court is located.

(2) Contents of Notice. The published notice must include the name of the individual to whom the notice is given, a statement describing the nature of the hearing, and a statement that the result of the hearing may affect the individual's interest in the matter, including possible termination of parental rights.

(3) Service of Notice. A copy of the notice shall be mailed to the individual to whom the notice is given at his or her last known address. If the last known address of the individual cannot be ascertained after diligent inquiry, mailing a copy of the notice is not required.

(4) Proof of service under this subrule shall be made according to MCR 2.106(G).

RULE 3.805. TEMPORARY PLACEMENTS, TIME FOR SERVICE OF NOTICE OF HEARING TO DETERMINE DISPOSITION OF CHILD.

(A) Time for ~~Personal~~ Service. ~~Personal s~~Service of notice of hearing on a petition for disposition of a child ~~pursuant to~~under MCL 710.23e(1) must be served at least:

(1) 3 days before the date set for hearing for personal service under MCR 2.107(C)(1) or (2), e-mail service under MCR 2.107(C)(4), or electronic service under MCR 1.109(G)(6)(a); or

(2) 7 days before the date set for hearing when served by first-class mail under MCR 2.107(C)(3).

~~(B) Time for Service by Mail. Service by mail must be made at least 7 days before the date set for hearing.~~

(~~C~~B) Interested Party, Whereabouts Unknown. If the whereabouts of an interested party, other than the putative father who did not join in the temporary placement, is unknown, service on that interested party

will be sufficient if ~~personal service or~~ service ~~by mail~~ is attempted at the last known address of the interested party.

(~~D~~C) [Relettered but otherwise unchanged.]

RULE 3.806. REHEARINGS.

(A) Filing, Notice and Response. A party may seek rehearing under MCL 710.64(1) by timely filing a petition stating the basis for rehearing. Immediately upon filing the petition, the petitioner must give all interested parties notice of its filing in accordance with MCR ~~5.105~~3.802. Any interested party may file a response within 7 days of the date of service of notice on the interested party.

(B)-(D) [Unchanged.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(B) [Unchanged.]

(C) Summons.

(1) [Unchanged.]

(2) The summons must also include the following advice to the defendant:

(a)-(c) [Unchanged.]

(d) The defendant has a right to a jury trial which will be lost unless it is demanded in the first defense response, written or oral. The jury trial fee must be paid when the demand is made, unless payment of fees is waived ~~or suspended~~ under MCR 2.002.

(D) Service of Process. A copy of the summons and complaint and all attachments must be served on the defendant ~~by mail. Unless the court does the mailing and keeps a record, the plaintiff must perfect the mail service by attaching a postal receipt to the proof of service. In addition to mailing, the defendant must be served~~ in one of the following ways:

(1) [Unchanged.]

(2) By delivering the ~~papers~~documents at the premises to a member of the defendant's household who is

(a)-(b) [Unchanged.]

(c) asked to deliver the ~~papers~~documents to the defendant; or

(3) After diligent attempts at personal service have been made, by securely attaching the ~~papers~~documents to the main entrance of the tenant's dwelling unit. A return of service made under this subrule ~~(D)(3)~~ must list the attempts at personal service. Service under this subrule ~~(D)(3)~~ is effective only if a return of service is filed showing that, after diligent attempts, personal service could not be made. An officer who files proof that service was made under this subrule ~~(D)(3)~~ is entitled to the regular personal service fee.

(E) [Unchanged.]

(F) Appearance and Answer; Default.

(1) Appearance and Answer. The defendant or the defendant's attorney must appear and answer the complaint by the date on the summons. Appearance and answer may be made as follows:

(a) [Unchanged.]

(b) By orally answering each allegation in the complaint at the hearing. The answers must be recorded ~~or noted on the complaint~~.

(2)-(3) [Unchanged.]

(4) Default.

(a) If the defendant fails to appear, the court, on the plaintiff's motion, may enter a default and may hear the plaintiff's proofs in support of judgment. If satisfied that the complaint is accurate, the court must enter a default judgment under MCL 600.5741, and in accord with subrule (K). The plaintiff must mail the default judgment ~~must be mailed~~ to the defendant and file a proof of service with the court.~~by the court clerk and~~ The default judgment must inform the defendant that (if applicable)

(i)-(ii) [Unchanged.]

(b)-(c) [Unchanged.]

(5) [Unchanged.]

(G)-(O) [Unchanged.]

RULE 4.202. SUMMARY PROCEEDINGS; LAND CONTRACT FORFEITURE.

(A)-(G) [Unchanged.]

(H) Answer; Default.

(1) [Unchanged.]

(2) Default.

(a) If the defendant fails to appear, the court, on the plaintiff's motion, may enter a default and may hear the plaintiff's proofs in support of judgment. If satisfied that the complaint is accurate, the court must enter a default judgment under MCL 600.5741, and in accord with subrule (J). The plaintiff must mail the default judgment ~~must be mailed~~ to the defendant and file a proof of service with the court.~~by the court clerk and~~ The default judgment must inform the defendant that (if applicable)

(i)-(ii) [Unchanged.]

(b)-(c) [Unchanged.]

(3) [Unchanged.]

(I)-(L) [Unchanged.]

RULE 4.303. NOTICE.

(A)-(B) [Unchanged.]

(C) Notice Not Served. If it appears that notice was not received by the defendant at least 7 days before the appearance date and the defendant does not appear, the clerk must, at the plaintiff's request, issue further notice without additional cost to the plaintiff, setting the hearing for a future date. The further notice may be served as provided in MCR 2.105.

RULE 4.306. REMOVAL TO TRIAL COURT.

(A) [Unchanged.]

(B) Order; Fee. On receiving a demand for removal, the court shall, by a written order filed in the action, direct removal to the trial court for further proceedings.

(1) [Unchanged.]

(2) ~~A copy of the order must be mailed to each party by the clerk~~The party demanding removal must promptly serve the order on the opposing party and file proof of service with the court.

(3) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 5.001. APPLICABILITY.

(A) Applicability of Rules. Procedure in probate court is governed by the general rules set forth in chapter one and by the rules applicable to other civil proceedings set forth in chapter two, except as modified by the rules in this chapter.

(B) [Unchanged.]

RULE 5.104. PROOF OF SERVICE; WAIVER AND CONSENT; UNOPPOSED PETITION.

(A) Proof of Service.

(1) Whenever service is required by statute or court rule, a proof of service must be filed promptly and ~~at the latest~~ before a hearing to which the ~~paper~~document relates. If the document does not involve a hearing, a proof of service must be filed with the document ~~or at the time the paper is required to be filed with the court if the paper does not relate to a hearing~~. The proof of service must include a description of the ~~papers~~documents served, the date of service, the manner and method of service, and the person or persons served.

(2) Except as otherwise provided by rule, proof of service of a ~~paper~~document required or permitted to be served may be by

(a) including it at the end~~a copy~~ of the notice of hearing or other documents being filed with the court, or~~, if any~~;

(b) a written statement by the individual who served the notice of hearing or other documents, verified under MCR 1.109(D)(3).~~copies of other paper served with the notice of hearing, with a description of the paper in the proof of service;)~~

~~(c) authentication under MCR 1.109(D)(3) of the person making service.~~

(3)-(4) [Unchanged.]

(B) Waiver and Consent.

(1) [Unchanged.]

(2) Consent. The relief requested in an application, petition, or motion may be granted by consent. An interested person who consents to an application, petition, or motion does not have to be served with or waive notice of hearing on the application, petition, or motion. The consent must

(a) [Unchanged.]

(b) be in a writing which is dated and signed by the interested person or someone authorized to consent on the interested person's behalf and must contain a ~~declaration~~statement that the person signing has received a copy of the application, petition, or motion.

(3)-(4) [Unchanged.]

(C) Unopposed Petition. If a petition is unopposed at the time set for the hearing, the court may either grant the petition on the basis of the recitations in the petition or conduct a hearing. However, an order determining heirs based on an uncontested petition to determine heirs may only be entered on the basis of ~~sworn~~ testimony or a ~~sworn testimony~~verified statement identifying heirs form. An order granting a petition to appoint a guardian may only be entered on the basis of testimony at a hearing.

RULE 5.105. MANNER AND METHOD OF SERVICE.

(A) Manner of Service.

(1) [Unchanged.]

(2) Unless another method of service is required by statute, court rule, or special order of a probate court, service may be made:

(a) to the current address of an interested person by registered, certified, or ordinary first-class mail~~.~~, or

(b) by electronic service in accordance with MCR 1.109(G)(6)(a).

Foreign consul and the Attorney General may be served by mail or by electronic service in accordance with MCR 1.109(G)(6)(a).

(3) An interested person whose address or whereabouts is not known may be served by publication, if ~~an affidavit or~~ a declaration of intent to give notice by publication, verified under MCR 1.109(D)(3) is filed with the court~~;~~. The declaration must set forth facts ~~showing~~asserting that the address or whereabouts of the interested person could not be ascertained on diligent inquiry. Except in proceedings seeking a determination of a presumption of death based on absence pursuant to MCL 700.1208(2), after an interested person has once been served by publication, notice is only required on an interested person whose address is known or becomes known during the proceedings.

(4) [Unchanged.]

(B) Method of Service.

(1) Personal Service.

(a) On an Attorney. Personal service of a ~~paper~~document on an attorney must be made by

(i)-(iii) [Unchanged.]

(iv) sending the ~~paper~~document by registered mail or certified mail, return receipt requested, and delivery restricted to the addressee; but service is not made for purpose of this subrule until the attorney receives the ~~paper~~document.

(b) On Other Individuals. Personal service of a ~~paper~~document on an individual other than an attorney must be made by

(i)-(ii) [Unchanged.]

(iii) sending the ~~paper~~document by registered mail or certified mail, return receipt requested, and delivery restricted to the addressee; but service is not made for purpose of this subrule until the individual receives the ~~paper~~document.

(c) [Unchanged.]

(2)-(3) [Unchanged.]

(4) E-mail. Unless otherwise limited or provided by this court rule or MCR 1.109(G)(6)(a)(ii), parties to a civil action or interested persons to a proceeding may agree to service by e-mail in the manner provided in and governed by MCR 2.107(C)(4).

(5) Electronic Service. Electronic service of a document shall be made in accordance with MCR 1.109(G)(6)(a) when required.

(C) Petitioner, Service Not Required. For service of notice of hearing on a petition, the petitioner, although otherwise an interested person, is presumed to have waived notice and consented to the petition, unless the petition expressly indicates that the petitioner does not waive notice and does not consent to the granting of the requested prayers without a hearing. Although a petitioner or a fiduciary may in fact be an interested person, the petitioner need not indicate, either by written waiver or proof of service, that the petitioner has received a copy of any ~~paper~~document required by these rules to be served on interested persons.

(D) [Unchanged.]

(E) Service on Beneficiaries of Future Interests. A notice that must be served on unborn or unascertained interested persons not represented by a fiduciary or guardian ad litem is considered served on the unborn or unascertained interested persons if it is served as provided in this subrule.

(1) If an interest is limited to persons in being and the same interest is further limited to the happening of a future event to unascertained or unborn persons, notice and ~~papers~~documents must be served on the persons to whom the interest is first limited.

(2) If an interest is limited to persons whose existence as a class is conditioned on some future event, notice and ~~papers~~documents must be served on the persons in being who would comprise the class if the required event had taken place immediately before the time when the ~~papers~~documents are served.

(3) If a case is not covered by subrule (E)(1) or (2), notice and ~~papers~~documents must be served on all known persons whose interests are substantially identical to those of the unascertained or unborn interested persons.

RULE 5.107. OTHER ~~PAPERS~~DOCUMENTS REQUIRED TO BE SERVED.

(A) Other ~~Papers~~Documents to be Served. The person filing a petition, an application, a ~~sworn testimony form~~verified statement identifying heirs, supplemental ~~sworn testimony form~~verified statement identifying heirs, a motion or objection, a response ~~or objection~~, an instrument offered or admitted to probate, an accounting, or a sworn closing statement with the court must serve a copy of that document on interested persons. The person who obtains an order from the court must serve a copy of the order on interested persons.

(B) Exceptions.

(1) Service of the ~~papers~~documents listed in subrule (A) is not required to be made on an interested person whose address or whereabouts, on diligent inquiry, is unknown, previous mailings to the last known address have been returned at least two times as undeliverable,

or on an unascertained or unborn person. The court may excuse service on an interested person for good cause.

(2) [Unchanged.]

RULE 5.108. TIME OF SERVICE.

(A)-(B) [Unchanged.]

(C) Electronic Service. Electronic service made under MCR 1.109(G)(6)(a) must be made at least 7 days before the date set for hearing or an adjourned date.

(C)-(E) [Relettered (D)-(F) but otherwise unchanged.]

RULE 5.113. FORM, CAPTIONING, SIGNING, AND VERIFYING DOCUMENTS.

(A) Forms of Documents Generally. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E). Documents must be ~~substantially in the~~filed on a form approved by the State Court Administrative Office~~,~~ if a form has been approved for the use. An application, petition, inventory, accounting, proof of claim, or proof of service must be verified in accordance with MCR 1.109(D)(3).

(B) Contents of Petitions.

(1) [Unchanged.]

(2) The petition may incorporate by reference ~~papers~~documents and lists of interested persons previously filed with the court if changes in the papers or lists are set forth in the incorporating petition.

(C) Filing by Registered Mail. Except as otherwise stated in this subrule~~Where e-filing is implemented~~, any document required by law to be filed in or delivered to the court by registered mail may be filed ~~through the electronic filing system~~in accordance with MCR 1.109(G)(6)(a). Deliveries of wills or codicils must be delivered in accordance with MCL 700.2515 and 700.2516.

(D) Filing Additional ~~Papers~~Documents. The court in its discretion may receive for filing a ~~paper~~document not required to be filed.

RULE 5.117. APPEARANCE BY ATTORNEYS.

(A) [Unchanged.]

(B) Appearance.

(1) [Unchanged.]

(2) Notice of Appearance. If an appearance is made in a manner not involving the filing of a ~~paper~~document served with the court or if the appearance is made by filing a ~~paper~~document which is not served on the interested persons, the attorney must promptly file a written appearance and serve it on the interested persons whose addresses are known or who are authorized users of the electronic filing system under MCR 1.109(G)(6)(a) and on the fiduciary. ~~The attorney's address and telephone number must be included in the appearance.~~

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other ~~paper~~document filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a ~~paper~~document in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal

is entered. This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the client.

(b) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 5.118. AMENDING OR SUPPLEMENTING PAPERS.

(A) ~~Papers~~Documents Subject to Hearing. A person who has filed a ~~paper~~document that is subject to a hearing may amend or supplement the ~~paper~~document

(1)-(2) [Unchanged.]

(B) ~~Papers~~Documents Not Subject to Hearing. A person who has filed a ~~paper~~document that is not subject to a hearing may amend or supplement the ~~paper~~document if service is made pursuant to these rules.

RULE 5.119. ADDITIONAL PETITIONS; OBJECTIONS; HEARING PRACTICES.

(A) Right to Hearing, New Matter. An interested person may, within the period allowed by law or these rules, file a petition and obtain a hearing with respect to the petition. The petitioner must serve copies of the petition and notice of hearing on the fiduciary and other interested persons whose addresses are known or who are authorized users of the electronic filing system under MCR 1.109(G)(6)(a).

(B) Objection to Pending Matter. An interested person may object to a pending petition orally at the hearing or by filing and serving a ~~paper~~document which conforms with MCR 5.113. The court may adjourn a hearing based on an oral objection and require that a proper written objection be filed and served.

(C)-(D) [Unchanged.]

RULE 5.120. ACTION BY FIDUCIARY IN CONTESTED MATTER; NOTICE TO INTERESTED PERSONS; FAILURE TO INTERVENE.

The fiduciary represents the interested persons in a contested matter. The fiduciary must give notice to all interested persons whose addresses are known or who are authorized users of the electronic filing system under MCR 1.109(G)(6)(a) that a contested matter has been commenced and must keep such interested persons reasonably informed of the fiduciary's actions concerning the matter. The fiduciary must inform the interested persons that they may file a petition to intervene in the matter and that failure to intervene shall result in their being bound by the actions of the fiduciary. The interested person shall be bound by the actions of the fiduciary after such notice and until the interested person notifies the fiduciary that the interested person has filed with the court a petition to intervene.

RULE 5.125. INTERESTED PERSONS DEFINED.

(A)-(B) [Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(18) [Unchanged.]

(19) The persons interested in a proceeding under the Mental Health Code in a petition for appointment of a guardian of an individual with a developmental disability are the

(a) individual,

(b) individual's attorney,

(c) petitioner,

(d) individual's presumptive heirs,

(e) preparer of the report or another appropriate person who performed an evaluation,

(f) director of any facility where the individual may be residing,

(g) individual's guardian ad litem, if appointed, and

(h) such other persons as the court may determine.

(19)-(24) [Renumbered (20)-(25) but otherwise unchanged.]

(25~~6~~) The persons interested in a petition for the modification or termination of a guardianship or conservatorship or for the removal of a guardian or a conservator are

(a) those interested in a petition for appointment under subrule (C)(~~19~~20), (2~~1~~2), (2~~2~~3), or (2~~4~~5) as the case may be, and

(b) [Unchanged.]

(26~~7~~) The persons interested in a petition by a conservator for instructions or approval of sale of real estate or other assets are

(a) [Unchanged.]

(b) those persons listed in subrule (C)(2~~4~~5) who will be affected by the instructions or order.

(27)-(28) [Renumbered (28)-(29) but otherwise unchanged.]

~~(29) The persons interested in a petition for emancipation of a minor are~~

~~(a) the minor,~~

~~(b) parents of the minor,~~

~~(c) the affiant on an affidavit supporting emancipation, and~~

~~(d) any guardian or conservator.~~

(30)-(32) [Unchanged.]

(33) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code, the persons interested in a proceeding affecting a trust other than those already covered by subrules (C)(6), (C)(~~28~~29), and (C)(32) are:

(a)-(g) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 5.126. DEMAND OR REQUEST FOR NOTICE.

(A) [Unchanged.]

(B) Procedure.

(1) Obligation to Provide Notice or Copies of Documents. Except in small estates under MCL 700.3982 and MCL 700.3983, the person responsible for serving a ~~paper~~document in a decedent estate, guardianship, or conservatorship in which a demand for notice is filed is responsible for providing copies of any orders and filings pertaining to the proceeding in which the demandant has requested notification. If no proceeding is pending at the time the demand is filed, the court must

notify the petitioner or applicant at the time of filing that a demand for notice has been filed and of the responsibility to provide notice to the demandant.

(2) Rights and Obligations of Demandant.

(a) [Unchanged.]

(b) Unless the demand for notice is limited to a specified class of ~~papers~~documents, the demandant is entitled to receive copies of all orders and filings subsequent to the filing of the demand. The copies must be served on the demandant through the electronic filing system if the demandant is an authorized user under MCR 1.109(G)(6)(a), but if not, mailed to the address specified in the demand. If the ~~address becomes invalid and the demandant does not provide a new address~~copies are undeliverable, no further copies of ~~papers~~documents need be provided to the demandant.

(C) Termination, Withdrawal.

(1)-(2) [Unchanged.]

(3) Withdrawal. The demandant may withdraw the demand at any time by communicating the withdrawal in writing to the fiduciary and to the court. If withdrawn, the demandant shall not continue to be served with documents in the case.

RULE 5.132. PROOF OF WILLS.

(A) [Unchanged.]

(B) Use of Copy of Will. When proof of a will is required and a deposition is to be taken, a copy of the original will or other document ~~made by photographic or similar process~~reproduced in accordance with the Records Reproduction Act, MCL 24.401 *et seq.* may be used at the deposition.

RULE 5.162. FORM AND SIGNING OF JUDGMENTS AND ORDERS.

(A) Form of Judgments and Orders. A proposed judgment or order must be prepared in accordance with MCR 2.602(A) and MCR 1.109(D)(2).~~include the name, address, and telephone number of the attorney or party who prepared it. All judgments and orders of the court must be typewritten or legibly printed in ink and signed by the judge to whom the proceeding is assigned.~~

(B) [Unchanged.]

RULE 5.202. LETTERS OF AUTHORITY.

(A) Issuance. Letters of authority shall be issued after the appointment and qualification of the fiduciary. If bond is ordered, the letters shall be issued after proof of bond has been filed with the court, unless otherwise ordered. Unless ordered by the court, letters of authority will not have an expiration date.

(B)-(C) [Unchanged.]

RULE 5.203. FOLLOW-UP PROCEDURES.

Except in the instance of a personal representative who fails to timely comply with the requirements of MCL 700.3951(1), if it appears to the court that the fiduciary is not properly administering the estate, the court shall proceed as follows:

(A) Notice of Deficiency. The court must notify the fiduciary, the attorney for the fiduciary, if any, and each of the sureties for the fiduciary of the nature of the deficiency, together with a notice to correct the deficiency within 28 days, or, in the alternative, to appear before the court or an officer designated by it at a time specified within 28 days for a conference concerning the deficiency. Service of the notice of deficiency is complete on mailing to the last known address of the fiduciary or when served under MCR 1.109(G)(6)(a).

(B) Conference, Memorandum. If a conference is held, the court must prepare a written memorandum setting forth the date of the conference, the persons present, and any steps required to be taken to correct the deficiency. The steps must be taken within the time set by the court but not to exceed 28 days from the date of the conference. A copy of the memorandum must be given to those present at the conference ~~and. i~~If the fiduciary is not present at the conference, a copy of the memorandum must be mailed to the last known address of the fiduciary ~~at the last known address~~or served on the fiduciary under MCR 1.109(G)(6)(a).

(C)-(E) [Unchanged.]

RULE 5.205. ADDRESS OF FIDUCIARY.

A fiduciary must keep the court and the interested persons informed in writing within 7 days of any change in the fiduciary's address even if the fiduciary is an authorized user of the electronic filing system. Any notice ~~sent to~~served on the fiduciary by the court ~~by ordinary mail~~ to the last address on file or under MCR 1.109(G)(6)(a) shall be notice to the fiduciary.

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES.

(A) Methods of Commencement. A decedent estate may be commenced by filing an application for an informal proceeding or a petition for a formal testacy proceeding. A request for supervised administration may be made in a petition for a formal testacy proceeding. When filing either an application or petition to commence a decedent estate, a copy of the death certificate must be attached. If the death certificate is not available, the petitioner may provide alternative documentation of the decedent's death. The court is prohibited from ~~R~~requiring additional documentation, such as information about the proposed or appointed personal representative~~, is prohibited~~.

(B) ~~Sworn Testimony~~Verified Statement Identifying Heirs Form. At least one ~~sworn testimony~~verified statement identifying heirs ~~form sufficient to establish the identity of heirs~~ and devisees must be submitted with the application or petition that commences proceedings. ~~A sworn testimony form must be executed before a person authorized to administer oaths.~~

(C)-(D) [Unchanged.]

RULE 5.304. NOTICE OF APPOINTMENT.

(A) Notice of Appointment. The personal representative must, not later than 14 days after appointment, serve notice of appointment by personal service or by first-class mail as provided in MCL 700.3705 and the agreement and notice relating to attorney fees required by MCR

5.313(D). No notice of appointment need be served if the person serving as personal representative is the only person to whom notice must be given.

(B) [Unchanged.]

(C) Prior Publication. After an interested person has once been served by publication, notice of appointment is only required if that person's address is known or becomes known during the proceedings or the person registers as an authorized user of the electronic filing system under MCR 1.109(G)(6)(a).

RULE 5.307. REQUIREMENTS APPLICABLE TO ALL DECEDENT ESTATES.

(A) Inventory Fee. Within 91 days of the date of the letters of authority, the personal representative must ~~submit to~~file with the court the information necessary for ~~computation of~~ the probate inventory fee. The inventory fee must be paid no later than the filing of the petition for an order of complete estate settlement under MCL 700.3952, the petition for settlement order under MCL 700.3953, or the sworn statement under MCL 700.3954, or one year after appointment, whichever is earlier.

(B) Notice of Continued Administration. If unable to complete estate administration within one year of the original personal representative's appointment, the personal representative must file with the court and serve on all interested persons a notice that the estate remains under administration, specifying the reason for the continuation of administration. The notice must be ~~given~~served within 28 days of the first anniversary of appointment and all subsequent anniversaries during which the administration remains uncompleted.

(C) Notice to Personal Representative. At the time of appointment, the court must provide the personal representative with written notice of information to be provided to the court. The notice should be substantially in the following form or in the form specified by MCR 5.310(E), if applicable:

"Inventory Information: Within 91 days of the date of the letters of authority, you must ~~submit to~~file the inventory with the court the information necessary for computation of the probate inventory fee. You must also provide the name and address of each financial institution listed on your inventory at the time the inventory is presented to the court. The address for a financial institution shall be either that of the institution's main headquarters or the branch used most frequently by the personal representative.

"Change of Address: You must keep the court and all interested persons informed in writing within 7 days of any change in your address that you have provided for service."

"Notice of Continued Administration: If you are unable to complete the administration of the estate within one year of the original personal representative's appointment, you must file with the court and all interested persons a notice that the estate remains under administration, specifying the reason for the continuation of the administration. You must give this notice within 28 days of the first anniversary of the

original appointment and all subsequent anniversaries during which the administration remains uncompleted."

"Duty to Complete Administration of Estate: You must complete the administration of the estate and file appropriate closing ~~papers~~documents with the court. Failure to do so may result in personal assessment of costs."

(D) [Unchanged.]

(E) Requiring or Filing of Additional ~~Papers~~Documents. Except in formal proceedings and supervised administration, the court may not require the filing of any ~~papers~~documents other than those required to be filed by statute or court rule. However, additional ~~papers~~documents may be filed under MCR 5.113(D).

RULE 5.308. FORMAL PROCEEDINGS.

(A) [Unchanged.]

(B) Determination of Heirs.

(1) [Unchanged.]

(2) Determination Without Estate Administration.

(a) Petition and ~~Testimony~~Verified Statement Form. Any person may initiate a formal proceeding to determine intestacy and heirs without appointment of a personal representative by filing a petition and a ~~sworn testimony~~verified statement form~~, executed before a person authorized to administer oaths,~~ sufficient to establish the domicile of the decedent at the time of death and the identity of the interested persons.

(b)-(d) [Unchanged.]

RULE 5.309. INFORMAL PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Notice of Intent to Seek Informal Appointment as Personal Representative.

(1) A person who desires to be appointed personal representative in informal proceedings must ~~give~~serve notice of intent to seek appointment and a copy of the application ~~to~~on each person having a prior or equal right to appointment who does not renounce this right in writing before the appointment is made.

(2)-(3) [Unchanged.]

(D) [Unchanged.]

RULE 5.310. SUPERVISED ADMINISTRATION.

(A)-(B) [Unchanged.]

(C) Filing ~~Papers~~Documents With the Court. The personal representative must file the following additional ~~papers~~documents with the court and serve copies on the interested persons:

(1) Inventory. The personal representative must file an inventory as prescribed by MCR 5.307(A).

~~(a) Administration Commenced Supervised. If supervised administration is ordered at the commencement of the estate administration, the personal representative must file the inventory within 91 days of the date of the letters of authority.~~

~~(b) Administration Commenced Without Supervision. If supervised~~

~~administration is ordered after a personal representative has been appointed, the court must specify in the order a time for that personal representative to file the inventory.~~

(2)-(6) [Unchanged.]

(7) Such other ~~papers~~documents as are ordered by the court.

(D) [Unchanged.]

(E) Notice to Personal Representative. When supervised administration is ordered, the court must serve a written notice of duties on the personal representative. The notice must be substantially as follows:

"Inventories: You are required to file an inventory of the assets of the estate within 91 days of the date of your letters of authority or as ordered by the court. The inventory must list in reasonable detail all the property owned by the decedent at the time of death, indicating, for each listed item, the fair market value at the time of decedent's death and the type and amount of any encumbrance. If the value of any item has been obtained through an appraiser, the inventory should include the appraiser's name and address with the item or items appraised by that appraiser.

"Accountings: You are required to file annually, or more often if the court directs, a complete itemized accounting of your administration of the estate, showing in detail all the receipts and disbursements and the property remaining in your hands together with the form of the property. When the estate is ready for closing, you are required to file a final accounting and an itemized and complete list of all properties remaining. Subsequent annual and final accountings must be filed within 56 days after the close of the accounting period.

"Change of Address: You are required to keep the court and interested persons informed in writing within 7 days of any change in your address that you have provided for service.

"Notice of Continued Administration: If you are unable to complete the administration of the estate within one year of the original personal representative's appointment, you must file with the court and all interested persons a notice that the estate remains under administration, specifying the reason for the continuation of the administration. You must give this notice within 28 days of the first anniversary of the original appointment and all subsequent anniversaries during which the administration remains uncompleted.

"Duty to Complete Administration of Estate: You must complete the administration of the estate and file appropriate closing ~~papers~~documents with the court. Failure to do so may result in personal assessment of costs."

(F)-(H) [Unchanged.]

RULE 5.311. CLOSING ESTATE.

(A) [Unchanged.]

(B) Formal Proceedings.

(1)-(2) [Unchanged.]

(3) Discharge. A personal representative may petition for discharge from liability with notice to the interested persons. A personal repre-

sentative who files such a petition with the court must also file the ~~papers~~documents described in MCR 5.310(C) and (D), as applicable, proofs of service of those ~~papers~~documents that are required to be served on interested persons, and such other ~~papers~~documents as the court may require. The court may order the personal representative discharged if the court is satisfied that the personal representative has properly administered the estate.

(4) Other Requests for Relief. With respect to other requests for relief, the petitioner must file appropriate ~~papers~~documents to support the request for relief.

(5) [Unchanged.]

(C) [Unchanged.]

RULE 5.313. COMPENSATION OF ATTORNEYS.

(A)-(C) [Unchanged.]

(D) Notice to Interested Persons. Within 14 days after the appointment of a personal representative or the retention of an attorney by a personal representative, whichever is later, the personal representative must ~~mail to~~serve on the interested persons whose interests will be affected by the payment of attorney fees, a notice ~~in the~~on a form ~~substantially~~ approved by the State Court Administrator and a copy of the written fee agreement. The notice must state:

(1)-(4) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 5.402. COMMON PROVISIONS.

(A)-(B) [Unchanged.]

(C) Responsibility for Giving Notice; Manner of Service. The petitioner is responsible for giving notice of hearing. Regardless of statutory provisions, an interested person may be served the notice by mail, ~~by~~ personal service, or when necessary, ~~by~~ publication. ~~when necessary; h~~However, if the person who is the subject of the petition is 14 years of age or older, notice of the initial hearing must be served on the person personally unless another method of service is specifically permitted in the circumstances.

(D) Letters of Authority. After entering an order appointing a fiduciary, the court must issue letters of authority after an acceptance of appointment is filed, and if ordered, the filing of the fiduciary's bond. The letters of authority shall be issued~~On the filing of the acceptance of appointment or bond required by the order appointing a fiduciary, the court shall issue letters of authority~~ on a form approved by the state court administrator. Any restriction or limitation of the powers of a guardian or conservator must be set forth in the letters of authority.

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1)-(4) [Unchanged.]

(5) If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall do all of the following:

(a)-(b) [Unchanged.]

(c) provide notice of the guardianship and the hearing scheduled in subrule (5)(a) and the potential applicability of the Indian Child Welfare Act and the Michigan Indian Family Preservation Act on a form approved by the State Court Administrative Office to the persons prescribed in MCR 5.125(A)(8), (C)(19), and (C)(25) in accordance with MCR 5.109(1). A copy of the notice shall be ~~mailed to~~served on the guardian ~~by first-class mail~~.

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) Petition for Guardianship of Minor.

(1) [Unchanged.]

(2) Investigation. Upon the filing of a petition, the court may appoint a guardian ad litem to represent the interests of a minor and may order the Department of Health and Human Services or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investigation in accordance with MCL 700.5204(1). If the petition involves an Indian child, the report shall contain the information required in MCL 712B.25(1). The report shall be filed with the court and served no later than 7 days before the hearing on the petition. If the petition for guardianship states that it is unknown whether the minor is an Indian child, the investigation shall include an inquiry into Indian tribal membership.

(3) [Unchanged.]

(4) Social History. ~~If the court requires t~~The petitioner ~~to~~must file a social history before a hearing is held on a petition for guardianship of a minor~~, it~~ and shall do so on a form approved by the State Court Administrative Office. The social history for minor guardianship is confidential, and it is not to be released, except on order of the court, to the parties or the attorneys for the parties.

(5) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 5.405. PROCEEDINGS ON GUARDIANSHIP OF INCAPACITATED INDIVIDUAL.

(A) Examination by Physician or Mental Health Professional.

(1) Admission of Report. The court may receive into evidence without testimony a written report of a physician or mental health professional who examined an individual alleged to be incapacitated, provided that a copy of the report is filed with the court five days before the hearing and that the report is ~~substantially in~~on the form required by the state court administrator. A party offering a report must promptly inform the parties that the report is filed and available. The court may issue on its own initiative, or any party may secure, a subpoena to compel the preparer of the report to testify.

(2)-(3) [Unchanged.]

(B)-(C) [Unchanged.]

RULE 5.409. REPORT OF GUARDIAN; INVENTORIES AND ACCOUNTS OF CONSERVATORS.

(A) Reports. A guardian shall file a written report annually within 56 days after the anniversary of appointment and at other times as the

court may order. Reports must be ~~substantially~~ in the form approved by the state court administrator. The guardian must serve the report on the persons listed in MCR 5.125(C)(2~~3~~4).

(B) [Unchanged.]

(C) Accounts.

(1)-(4) [Unchanged.]

(5) Contents. The accounting is subject to the provisions of MCR 5.310(C)(2)(c) and (d), except that references to a personal representative shall be to a conservator. A copy of the corresponding financial institution statement ~~must be presented to the court~~ or a verification of funds on deposit must be filed with the court, either of which must reflect the value of all liquid assets held by a financial institution dated within 30 days after the end of the accounting period, unless waived by the court for good cause.

(6) [Unchanged.]

(D) Service and Notice. A copy of the account must be ~~sent to~~served on the interested persons as provided by these rules. Notice of hearing to approve the account must be ~~given to~~served on interested persons as provided in subchapter 5.100 of these rules.

(E)-(F) [Unchanged.]

RULE 5.501. TRUST PROCEEDINGS IN GENERAL.

(A)-(C) [Unchanged.]

(D) Appointment of Trustee not Named in Creating Document. An interested person may petition the court for appointment of a trustee when there is a vacancy in a trusteeship. The court may issue an order appointing as trustee the person nominated in the petition or another person. The order must state whether the trustee must file a bond or ~~execute~~sign and file an acceptance.

(E) Qualification of Trustee. A trustee appointed by an order of the court, nominated as a trustee in a will that has been admitted to probate shall qualify by ~~executing~~signing and filing an acceptance indicating the nominee's willingness to serve. The trustee must serve the acceptance and order, if any, on the then known qualified trust beneficiaries described in MCL 700.7103(g)(i) and, in the case of a testamentary trustee, on the personal representative of the decedent estate, if one has been appointed. No letters of trusteeship shall be issued by the court. The trustee or the attorney for the trustee may establish the trustee's incumbency by executing an affidavit to that effect, identifying the trustee and the trust and indicating that any required bond has been filed with the court and is in force.

(F) [Unchanged.]

RULE 5.784. PROCEEDINGS ON A DURABLE POWER OF ATTORNEY FOR HEALTH CARE OR MENTAL HEALTH TREATMENT.

(A)-(B) [Unchanged.]

(C) Notice of Hearing, Service, Manner and Time.

(1) Manner of Service. If the address of an interested party is known or can be learned by diligent inquiry, notice must be by mail or personal service, but service by mail must be supplemented by

facsimile, electronic mail, or telephone contact within the period for timely service when the hearing is an expedited hearing or a hearing on the initial determination regarding whether the patient is unable to participate in medical or mental health treatment decisions.

(2)-(3) [Unchanged.]

(D)-(E) [Unchanged.]

Staff comment: The proposed amendments of Rules 1.109, 2.102, 2.104, 2.106, 2.107, 2.117, 2.119, 2.403, 2.503, 2.506, 2.508, 2.518, 2.602, 2.603, 2.621, 3.101, 3.104, 3.203, 3.205, 3.210, 3.302, 3.607, 3.613, 3.614, 3.705, 3.801, 3.802, 3.805, 3.806, 4.201, 4.202, 4.303, 4.306, 5.001, 5.104, 5.105, 5.107, 5.108, 5.113, 5.117, 5.118, 5.119, 5.120, 5.125, 5.126, 5.132, 5.162, 5.202, 5.203, 5.205, 5.302, 5.304, 5.307, 5.308, 5.309, 5.310, 5.311, 5.313, 5.402, 5.404, 5.405, 5.409, 5.501, and 5.784 and new rule 3.618 of the Michigan Court Rules are an expected progression necessary for design and implementation of the statewide electronic-filing system. These particular amendments will assist in implementing the goals of the project.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered September 27, 2018:

PROPOSED AMENDMENT OF MCR 2.513.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.513 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.513. CONDUCT OF JURY TRIAL.

(A) Preliminary Instructions. After the jury is sworn and before evidence is taken, the court shall orally provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be orally instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall also provide each juror with a written copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions.

(B)-(M) [Unchanged.]

(N) Final Instructions to the Jury.

(1) Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must orally instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may orally instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate.

(2) Solicit Questions about Final Instructions. As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations. ~~Upon concluding the final instructions~~After orally delivering the final jury instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate.

(3)-(4) [Unchanged.]

(O)-(P) [Unchanged.]

Staff Comment: The proposed amendment of MCR 2.513 would explicitly provide that a court must orally recite its preliminary and final jury instructions for the jury (in addition to providing them in writing). The proposed amendment would clarify that even though a juror is entitled to a written set of instructions, the judge must still orally instruct the jury. This proposed amendment would conform the rule to the opinion issued by the Court in *People v Traver*.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications

specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2019 at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-05. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered September 27, 2018:

PROPOSED AMENDMENT OF RULE 7.2 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.2 of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.2. ADVERTISING.

(a)-(c) [Unchanged.]

(d) For purposes of media advertising, services of a lawyer or law firm that are advertised under the heading of a phone number, web address, or trade name shall identify the name and contact information of at least one lawyer responsible for the content of the advertisement.

Staff Comment: The proposed amendment of MRPC 7.2 would require media lawyer advertisements to identify the name and contact information of at least one lawyer providing services. This proposal is being republished in light of the ABA's recent adoption of revisions of the model rules regarding attorney advertising.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may

be sent to the Office of Administrative Counsel in writing or electronically by January 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 3, 2018:

PROPOSED ADMINISTRATIVE ORDER TO REQUIRE COURTS TO ESTABLISH SECURITY COMMITTEES.

On order of the Court, this is to advise that the Court is considering the adoption of an Administrative Order requiring courts to establish security committees. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

ADMINISTRATIVE ORDER NO. 2018-XX — ESTABLISHMENT OF COURT SECURITY COMMITTEES.

The issue of courthouse security is of vital importance to ensure the safety of the public, litigants, and the judicial employees of this state. Accordingly, the Supreme Court issues the following order regarding the administrative responsibilities of each chief judge in Michigan as they relate to courthouse security.

It is ordered that each chief judge or, in any facility with multiple chief judges, one chief judge as designated by consensus of the chief judges, establish a standing courthouse security committee to be chaired by the chief judge or his/her designee. The members of the committee shall include representatives of the court's funding unit, local law enforcement, the Clerk of Court, and other facility stakeholders. The courthouse security committee is responsible for creating and promoting policies and procedures to improve the safety and security of the courthouse.

Each court shall submit to the State Court Administrative Office (SCAO) a local administrative order that establishes the courthouse security committee in accordance with the model local administrative order developed by the SCAO. Courts with multiple chief judges in one location and courts that have multiple locations must follow the instructions provided by the SCAO for establishing the standing courthouse security committee. In developing the security committee, courts are

directed to work with local funding units and to collaborate with other entities in shared facilities, where appropriate.

Proposed local administrative orders must be submitted to the SCAO no later than (MM/DD/YYYY).

Staff Comment: This administrative order would direct courts to establish a standing courthouse security committee to be chaired by the chief judge or his/her designee. The attached appendix is a proposed model local administrative order developed by the SCAO.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-21. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

APPENDIX

State Court Administrative Office

Model Local Administrative Order XX - Establishment of a Courthouse Security Committee

[LOCAL COURT LETTERHEAD]

Administrative Order [Year] - [Number]

ESTABLISHMENT OF A COURTHOUSE SECURITY COMMITTEE

This administrative order is issued in accordance with Michigan Supreme Court Administrative Order No. 2018-XX. The purpose of this order is to establish a courthouse security committee.

IT IS ORDERED:

1. At the direction of the chief judge (*if a court location has more than one chief judge, the chief judges must decide which one of them shall take the lead. If the chief judges are unable to determine a lead chief judge, the SCAO regional administrator shall select one. If the jurisdiction is a multi-county circuit, each county must have a security committee. The multi-county chief judge can appoint a presiding judge in a county to form the committee.*), a courthouse security committee is established effective (*date of establishment*). The chairperson of the

committee is (*either chief judge or his/her designee; if the chair is not the chief judge, identify the position of the person designated, for example, "court administrator."*).

2. Members of the Security Committee shall include representatives of (*name of funding unit, county sheriff and/or local law enforcement, Clerk of the Court, and other entities/stakeholders in the court facility. If there are multiple court locations, identify each and the members of the committee from each location*).

3. The security committee shall:

- Develop and promote security policies and procedures regarding court security and emergency management;
- Establish goals and objectives specific to improving physical security, emergency preparedness, and employee training;
- Review all courthouse security incidents and take appropriate corrective measures to mitigate and/or eliminate any security vulnerabilities to prevent future reoccurrences.

4. The chairperson of the committee shall:

- Facilitate communication, coordination, and decision-making among members (e.g., facility stakeholders) on policies and procedures affecting court security and emergency management;
- Seek member advice and input on goals, objectives, priorities, and issues involving court security and emergency management;
- Work in consultation with local law enforcement and emergency management professionals. The SCAO regional administrator will be kept apprised of meeting times and locations and be consulted as necessary.
- Submit a report to the State Court Administrative Office within one year of the first committee meeting and an updated report every two years thereafter concerning the actions taken by the committee under subsection 3. The report shall describe the court's current security policies and procedures, the goals and objectives established by the committee to improve courthouse security, and a summary of any courthouse security incidents occurring during the reporting period and related corrective measures taken by the court.

5. The security committee shall meet (*provide intervals of meetings, but no less than four times per calendar year*).

Date:_____ _____
CHIEF CIRCUIT JUDGE

Date:_____ _____
CHIEF PROBATE JUDGE

Date:_____ _____
CHIEF DISTRICT JUDGE

Date:_____ _____
MULTI-COURT CHIEF JUDGE

(*Strike or add lines as needed*)

Order Entered October 17, 2018:

PROPOSED AMENDMENT OF MCR 6.425.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.425 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(D) [Unchanged.]

(E) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

(a)-(d) [Unchanged.]

(e) if the sentence imposed is not within the guidelines range, articulate the ~~substantial and compelling~~ reasons justifying that specific departure, and

(f) [Unchanged.]

(2)-(3) [Unchanged.]

(F) Advice Concerning the Right to Appeal; Appointment of Counsel.

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a)-(b) [Unchanged.]

(c) the request for a lawyer must be ~~made~~filed with the court within 42 days after sentencing.

(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a)-(b) [Unchanged.]

(c) the request for a lawyer must be ~~made~~filed with the court within 42 days after sentencing.

(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be ~~completed and returned to~~filed with the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer.

(4) [Unchanged.]
(G) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.425 would make the rule consistent that requests for counsel must be filed within 42 days, as opposed to simply "made" or "completed and returned." It would also remove the requirement for a sentencing judge to articulate substantial and compelling reasons to deviate from the guidelines range, pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 17, 2018:

PROPOSED AMENDMENTS OF MCR 7.212 AND 7.312.

On order of the Court, this is to advise that the Court is considering amendments of Rules 7.212 and 7.312 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.212. BRIEFS.

(A)-(G) [Unchanged.]
(H) Amicus Curiae.
(1)-(2) [Unchanged.]

(3) Except for briefs presented on behalf of amicus curiae listed in MCR 7.312 (H)(2), a brief filed under this rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

(I)-(J) [Unchanged.]

RULE 7.312. BRIEFS AND APPENDIXES IN CALENDAR CASES.

(A)-(G) [Unchanged.]

(H) Amicus Curiae Briefs and Argument.

(1)-(3) [Unchanged.]

(4) Except for briefs presented on behalf of amicus curiae listed in subrule (H)(2), a brief filed under this rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

(54) [Renumbered but otherwise unchanged.]

(I)-(J) [Unchanged.]

Staff Comment: The proposed amendments of MCR 7.212 and 7.312 would require amicus briefs to indicate certain information regarding the preparation of the brief and disclosure of monetary contributions. The proposal would be similar to Supreme Court Rule 37.6.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2019 at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-04. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 17, 2018:

PROPOSED AMENDMENT OF MCR 3.993.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.993 of the Michigan Court Rules. Before

determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.993. APPEALS.

(A) The following orders are appealable to the Court of Appeals by right:

(1)-(2) [Unchanged.]

(3) any order required by law to be appealed to the Court of Appeals, ~~and~~

(4) any order involving an Indian child that is subject to potential invalidation under the Michigan Indian Family Preservation Act section MCL 712B.39 or the Indian Child Welfare Act section 25 USC 1914, which includes, but is not limited to, an order regarding:

(a) recognition of the jurisdiction of a tribal court pursuant to MCL 712B.7, MCL 712B.29, or 25 USC 1911;

(b) transfer to tribal court pursuant to MCL 712B.7 or 25 USC 1911;

(c) intervention pursuant to MCL 712B.7 or 25 USC 1911;

(d) extension of full faith and credit to public acts, records, and judicial proceedings of an Indian tribe pursuant to MCL 712B.7 or 25 USC 1911;

(e) removal of a child from the home, placement into foster care, or continuance of an out-of-home placement pursuant to MCL 712B.9, MCL 712B.15, MCL 712B.25, MCL 712B.29, or 25 USC 1912;

(f) termination of parental rights pursuant to MCL 712B.9, MCL 712B.15, or 25 USC 1912;

(g) appointment of counsel pursuant to MCL 712B.21 or 25 USC 1912;

(h) examination of reports pursuant to MCL 712B.11 or 25 USC 1912;

(i) voluntary consent to or withdrawal of a voluntary consent to a foster care placement or to a termination of parental right pursuant to MCL 712B.13, MCL 712B.25, MCL 712B.27, or 25 USC 1913;

(j) foster care, pre-adoptive, or adoptive placement of an Indian child pursuant to MCL 712B.23; and

(5~~4~~) any final order.

(B)-(C) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.993, recommended by the State Bar of Michigan, would establish a list of specific orders that can be appealed by right regarding an Indian child subject to a child protective proceeding.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-07. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 28, 2018:

PROPOSED AMENDMENTS OF MCR 6.001, 6.006, 6.425, 6.427, 6.610, 7.202, AND 7.208 AND PROPOSED ADOPTION OF MCR 6.430.

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.001, 6.006, 6.425, 6.427, 6.610, 7.202, and 7.208 and a proposed addition of Rule 6.430 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearings are posted at [https://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Rule 6.430 is a proposed new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULE AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(E)(3), 6.427, 6.430, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

RULE 6.006. VIDEO AND AUDIO PROCEEDINGS.

(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, ~~and~~ waivers and adjournments of preliminary examinations, and hearings on postjudgment motions to amend restitution.

(B)-(D) [Unchanged.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(D) [Unchanged.]

(E) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

(a)-(e) [Unchanged.]

(f) order the dollar amount of restitution that the defendant must pay to make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate.

(2) Resolution of Challenges.

(a) If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(i~~a~~) correct or delete the challenged information in the report, whichever is appropriate, and

(ii~~b~~) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

(b) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

(3) [Unchanged.]

(F)-(G) [Unchanged.]

RULE 6.427. JUDGMENT.

Within 7 days after sentencing, the court must date and sign a written judgment of sentence that includes:

(1)-(8) [Unchanged.]

(9) the conditions incident to the sentence; ~~and~~

(10) whether the conviction is reportable to the Secretary of State pursuant to statute, and, if so, the defendant's Michigan driver's license number.; and

(11) the dollar amount of restitution that the defendant is ordered to pay.

If the defendant was found not guilty or for any other reason is entitled to be discharged, the court must enter judgment accordingly. The date a judgment is signed is its entry date.

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing

(1) For sentencing, the court shall:

(a)-(c) [Unchanged.]

(d) order the dollar amount of restitution that the defendant must pay to make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate. Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

RULE 6.430. POSTJUDGMENT MOTION TO AMEND RESTITUTION.

(A) The court may amend an order of restitution entered under this section on a motion filed by the prosecuting attorney, the victim, or the defendant based upon new information related to the injury, damages, or loss for which the restitution was ordered.

(B) Filing. The moving party must file the motion and a copy of the motion with the clerk of the court in which the defendant was convicted and sentenced. Upon receipt of a motion, the clerk shall file it under the same case number as the original conviction.

(C) Service and Notice of Hearing. If the defendant is the moving party, he/she shall serve a copy of the motion and notice of its filing on the prosecuting attorney and the prosecutor shall then serve a copy of the motion and notice upon the victim. If the prosecutor is the moving party, he/she shall serve a copy of the motion and notice of its filing on the defendant and the victim. If the victim is the moving party, he/she shall serve a copy of the motion and notice of its filing on the defendant and the prosecutor. The home address, home telephone number, work address, and work telephone number of the victim, if included on a motion to amend restitution, is nonpublic. Unless so ordered by the court, the filing and service of the motion does not require a response by the non-moving party. If the court orders the non-moving party to respond to the motion, the non-moving party shall comply with the time for service of the response as provided in MCR 2.119(C)(2). The court shall provide written notice of hearing on the motion to the defendant, prosecutor, and victim.

(D) Appearance. As permitted by MCR 6.006(A), the court may allow the defendant to appear by two-way interactive video technology to conduct the proceeding between a courtroom and a prison, jail, or other location.

(E) Ruling. The court, in writing, shall enter an appropriate order disposing of the motion and, if the motion is granted, enter an order amending the restitution.

(F) Appeal. An appeal from this subsection is processed as provided by MCR 7.100 *et seq*., and 7.200 *et seq*.

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) [Unchanged.]

(b) In a criminal case,

(i)-(iii) [Unchanged.]

(iv) a sentence imposed, or order entered, by the trial court following a remand from an appellate court in a prior appeal of right; ~~or~~

(v) a sentence imposed following revocation of probation~~.~~; or

(vi) an order amending restitution.

RULE 7.208. AUTHORITY OF COURT OR TRIBUNAL APPEALED FROM.

(A)-(F) [Unchanged.]

(G) Stays and Bonds; Motions to Amend Restitution. The trial court retains authority over stay and bond matters, except as the Court of Appeals otherwise orders. The trial court retains authority over motions to amend restitution filed pursuant to MCR 6.430, unless restitution is included as an issue on appeal.

(H)-(J) [Unchanged.]

Staff Comment: The proposed amendments would more explicitly require restitution to be ordered at the time of sentencing as required by statute, and would establish a procedure for modifying restitution amounts. This published version was based on an original submission from the State Appellate Defenders Office, but includes additional revisions and alternative language as well.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-17. Your comments and the comments of others will be posted under the chapter affected by this proposal at [https://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 28, 2018:

PROPOSED AMENDMENTS OF MCR 1.111 AND 8.127.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 1.111 and Rule 8.127 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx.]

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.111. FOREIGN LANGUAGE INTERPRETERS.

(A) Definitions. When used in this rule, the following words and phrases have the following definitions:

(1)-(5) [Unchanged.]

(6) "Qualified foreign language interpreter" means:

(a) A person who provides interpretation services, provided that the person has:

(i) registered with the State Court Administrative Office; and

(ii) passed the consecutive portion of a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator (if testing exists for the language), and is actively engaged in becoming certified; and

~~(ii)~~(iii) met the requirements established by the state court administrator for this interpreter classification; and

~~(iii)~~(iv) been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(b)-(c) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 8.127. FOREIGN LANGUAGE BOARD OF REVIEW AND REGULATION OF FOREIGN LANGUAGE INTERPRETERS.

(A)-(B) [Unchanged.]

(C) Interpreter Registration

(1) Interpreters who meet the requirements of MCR 1.111(A)(4) and MCR 1.111(A)(6)(a) and (b) must register with the State Court Administrative Office and renew their registration before October 1 of each year in order to maintain their status. The fee for registration is $60. The fee for renewal is $30. The renewal application shall include

a statement showing that the applicant has used interpreting skills during the 12 months preceding registration. Effective 2019, rRenewal applications must be filed or postmarked on or before September 130. Any application filed or postmarked after that date must be accompanied by a late fee of $100. Any late registration made after December 31 or any application that does not demonstrate efforts to maintain proficiency shall require board approval.

(2) [Unchanged.]

(D) [Unchanged.]

Staff Comment: These two proposals, which would promote greater confidence that a qualified foreign language interpreter is proficient in the language and would reduce the possibility that renewals are delayed, were recommended to the Court by the Foreign Language Board of Review.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 28, 2018:

PROPOSED AMENDMENTS OF MCR 1.105, 2.301, 2.302, 2.305, 2.306, 2.307, 2.309, 2.310, 2.312, 2.313, 2.314, 2.316, 2.401, 2.410, 2.506, 3.201, 3.206, 3.922, 3.973, 3.975, 3.976, 3.977, AND 5.131 AND PROPOSED ADOPTION OF MCR 3.XXX.

On order of the Court, this is to advise that the Court is considering amendment of MCR 1.105, 2.301, 2.302, 2.305, 2.306, 2.307, 2.309, 2.310, 2.312, 2.313, 2.314, 2.316, 2.401, 2.410, 2.506, 3.201, 3.206, 3.922, 3.973, 3.975, 3.976, 3.977, 5.131 and proposed new Rule 3.XXX. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Rule 3.XXX is a proposed new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.105. CONSTRUCTION.

These rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.

RULE 2.301. AVAILABILITY AND TIMING~~COMPLETION~~ OF DISCOVERY.

(A) Availability of Discovery.

(1) In a case where initial disclosures are required, a party may seek discovery only after the party serves its initial disclosures under MCR 2.302(A). Otherwise, a party may seek discovery after commencement of the action when authorized by these rules, by stipulation, or by court order.

(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.

(3) Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions.

(4) After a postjudgment motion is filed in a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(B) Completion of Discovery.

~~(A)~~(1) In circuit and probate court, the time for completion of discovery shall be set by an order entered under MCR 2.401(B)~~(2)(a)~~.

~~(B)~~(2) In an action in which discovery is available only on leave of the court or by stipulation, the order or stipulation shall set a time for completion of discovery. A time set by stipulation may not delay the scheduling of the action for trial.

~~(C)~~(3) After the time for completion of discovery, a deposition of a witness taken solely for the purpose of preservation of testimony may be taken at any time before commencement of trial without leave of court.

(4) Unless ordered otherwise, a date for the completion of discovery means the serving party shall initiate the discovery by a time that provides for a response or appearance, per these rules, before the completion date. As may be reasonable under the circumstances, or by leave of court, motions with regard to discovery may be brought after the date for completion of discovery.

(C) Course of Discovery. The court may control the scope, order, and amount of discovery, consistent with these rules.

RULE 2.302. DUTY TO DISCLOSE; GENERAL RULES GOVERNING DISCOVERY.

~~(A) Availability of Discovery.~~

~~(1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.~~

~~(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.~~

~~(3) Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions.~~

~~(4) After a postjudgment motion is filed pursuant to a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.~~

(A) Required Initial Disclosures.

(1) In General. Except as exempted by these rules, stipulation, or court order, a party must, without awaiting a discovery request, provide to the other parties:

(a) the factual basis of the party's claims and defenses;

(b) the legal theories on which the party's claims and defenses are based, including, if necessary for a reasonable understanding of the claim or defense, citations to relevant legal authorities;

(c) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(d) a copy—or a description by category and location—of all documents, ESI, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(e) a description by category and location of all documents, ESI, and tangible things that are not in the disclosing party's possession, custody, or control that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment. The description must include the name and, if known, the address and telephone number of the person who has possession, custody, or control of the material;

(f) a computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under MCR 2.310 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;

(g) a copy (or an opportunity to inspect a copy) of pertinent portions of any insurance, indemnity, or suretyship agreement under which another person may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

(h) the anticipated subject areas of expert testimony.

(2) Additional Disclosures for No-Fault Cases. In addition to the disclosures under subrule (A)(1), in a case asserting a first-party claim for benefits under the Michigan no-fault act, MCL 500.3101, *et seq*., the following disclosures must be made without awaiting a discovery request:

(a) The defendant insurance company must disclose:

(i) a copy of the first-party claim file and a privilege log for any redactions and

(ii) the payments the insurance company has made on the claim.

(b) The plaintiff must disclose all applicable claims, including all of the following information within the plaintiff's possession, custody, or control:

(i) the identity of those who provided medical, household, and attendant care services to plaintiff,

(ii) all provider bills or outstanding balances for which the plaintiff seeks reimbursement,

(iii) the name, address, and phone number of plaintiff's employers, and

(iv) the additional disclosures under subrule (A)(3).

(3) Additional Disclosures by Claimants for Damages for Personal Injury. A party claiming damages for injury arising from a mental or physical condition must provide the other parties with executed medical record authorizations in the form approved by the State Court Administrative Office for all persons, institutions, hospitals, and other custodians in actual possession of medical information relating to the condition, unless the party asserts privilege pursuant to MCR 2.314(B).

(4) Cases Exempt from Initial Disclosure. Unless otherwise stipulated or ordered, the following are exempt from initial disclosure under subrule (A)(1)-(3):

(a) an appeal to the circuit court under subchapter 7.100;

(b) an action in district court (see MCR 2.301[A][2]);

(c) an action under subchapter 3.200;

(d) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(e) an action to enforce or quash an administrative summons or a subpoena;

(f) a proceeding ancillary to a proceeding in another court, including an action for a subpoena under MCR 2.305(E) or (F);

(g) an action to compel or stay arbitration or to confirm, vacate, enforce, modify, or correct an arbitration award;

(h) an action for collection of penalties, fines, forfeitures, or forfeited recognizances under MCR 3.605;

(i) personal protection proceedings under subchapter 3.700; and

(j) an action for habeas corpus under MCR 3.303 and 3.304.

(5) Time for Initial Disclosures.

(a) Application of Time Limits. These deadlines apply unless a stipulation or order sets a different time.

(b) In General.

(i) A party that files a complaint, counterclaim, cross-claim, or third-party complaint must serve its initial disclosures within 14 days after any opposing party files an answer to that pleading.

(ii) A party answering a complaint, counterclaim, cross-claim, or third-party complaint must serve its initial disclosures within the later of 14 days after the opposing party's disclosures are due or 28 days after the party files its answer.

(iii) A party serving disclosures need only serve parties that have appeared. The party must serve later-appearing parties within 14 days of the appearance.

(c) Parties Served or Joined Later. A party first served or otherwise joined after the time for initial disclosures under subrule (A)(5)(a) or (b) must serve its initial disclosures within 14 days after filing the party's first pleading, unless a stipulation or order sets a different time.

(6) Basis for Initial Disclosure; Unacceptable Excuses. A party must serve initial disclosures based on the information then reasonably available to the party. However, a party is not excused from making disclosures because the party has not fully investigated the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(7) Form of Disclosures. Disclosures under subrule (A) are subject to MCR 2.302(G), must be in writing, signed, and served, and a proof of service must be promptly filed.

(B) Scope of Discovery.

(1) In General. Parties may obtain discovery regarding any ~~matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable.

(2)-(3) [Unchanged.]

(4) Trial Preparation; Experts.

(a)-(d) [Unchanged.]

(e) Subrule (B)(3)(a) protects drafts of any interrogatory answer required under Subrule (B)(4)(a)(i), regardless of the form in which the draft is recorded.

(f) Subrule (B)(3)(a) protects communications between the party's attorney and any expert witness under subrule (B)(4), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(5) ~~Electronically Stored Information~~Duty to Preserve ESI. A party has the same obligation to preserve ~~electronically stored information~~ESI as it does for all other types of information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(6) Limitation of Discovery of ~~Electronic Materials~~ESI. A party need not provide discovery of ~~electronically stored information~~ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery ~~from such sources~~ if the requesting party shows good cause, considering proportionality under subrule (B)(1) and the limitations of ~~MCR 2.302~~subrule (C). The court may specify conditions for the discovery~~.~~, including allocation of the expense, and may limit the frequency or extent of discovery of ESI (whether or not the ESI is from a source that is reasonably accessible).

(7) [Unchanged.]

(C) [Unchanged.]

(D) Sequence ~~and Timing~~ of Discovery. Unless the court orders otherwise, ~~on motion, for the convenience of parties and witnesses and in the interests of justice,~~ methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay another party's discovery.

(E) ~~Supplementation of~~ Supplementing Disclosures and Responses.

(1) Duty to Supplement. ~~A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired later, except as follows:~~

~~(a) A party is under a duty seasonably to supplement the response with respect to a question directly addressed to~~

~~(i) the identity and location of persons having knowledge of discoverable matters; and~~

~~(ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.~~

(a) In General. A party that has made a disclosure under MCR 2.302(A)—or that has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(i) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing or

(ii) as ordered by the court.

~~(b) A party is under a duty seasonably to amend a prior response if the party obtains information on the basis of which the party knows that~~

~~(i) the response was incorrect when made; or~~

~~(ii) the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.~~

(be) Order, Agreement, or Request. A duty to supplement disclosures or responses may be imposed by order of the court, agreement of the parties, or at any time before trial through ~~new~~ requests for supplementation ~~of prior disclosures or responses~~.

(2) Failure to Supplement. If the court finds, by way of motion or otherwise, that a party has not ~~seasonably~~ supplemented disclosures or responses as required by this subrule, the court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b).

(F) ~~Stipulations Regarding~~ Changes to Discovery Procedure. ~~Unless the~~ A court order~~s otherwise, the parties may by~~ or written and filed stipulation of the affected parties may:

(1) [Unchanged.]

(2) ~~modify the procedures of these rules for other methods of discovery, except that stipulations extending the time within which discovery may be sought or for responses to discovery may be made only with the approval of the court.~~change the disclosure requirements in MCR 2.302(A) and the limits on interrogatories in MCR 2.309(A)(2); and

(3) modify or waive the other procedures of these rules regarding discovery so long as not inconsistent with a court order, but a stipulation may not change scheduling order deadlines without court approval.

(G) Signing of Disclosures, Discovery Requests, Responses, and Objections; Sanctions.

(1) In addition to any other signature required by these rules, every disclosure under MCR 2.302(A), every request for discovery, and every response or objection to such a request made by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the disclosure, request, response, or objection.

(2) If a disclosure, request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the disclosure, request, response, or objection, and another party need not take any action with respect to it until it is signed.

(3) The signature of the attorney or party constitutes a certification that he or she has read the disclosure, request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry ~~it is~~:

(a) the disclosure is

(i) complete and correct as of the time it is made; and

(ii) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(b) the discovery request, response, or objection is:

(i) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

~~(b)~~(ii) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

~~(c)~~(iii) not unreasonable or unduly burdensome or expensive, given the needs of the case, the disclosure and discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(4) If a certification is made in violation of this rule, the court, on the motion of a party or on its own initiative, ~~shall~~ may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

(H) Filing and Service of Disclosure and Discovery Materials.

(1) Unless required by a particular rule, ~~requires filing of disclosure or discovery materials,~~ disclosures, requests, responses, depositions, and other discovery materials may not be filed with the court except as follows:

(a) If ~~discovery~~ the materials are to be used in connection with a motion, they must either be filed separately or be attached to the motion, response, or an accompanying affidavit.

(b) If ~~discovery~~ the materials are to be used at trial, they must be made an exhibit ~~pursuant to~~ under MCR 2.518 or MCR 3.930.

(c) The court may order disclosure or discovery materials to be filed.

(2) Copies of disclosure and discovery materials served under these rules must be served on all parties ~~to the action~~, unless the court has entered an order under MCR 2.107(F).

(3) On appeal, only disclosure and discovery materials that were filed or made exhibits are part of the record on appeal.

(4) MCR 2.316 governs ~~R~~removal and destruction of disclosure and discovery materials ~~are governed by MCR 2.316~~.

RULE 2.305. DISCOVERY SUBPOENA ~~FOR TAKING DEPOSITION OF~~TO A NON-PARTY.

(A) General Provisions.

(1) A represented party may issue a subpoena to a non-party for a deposition, production or inspection of documents, inspection of tangible things, or entry to land upon court order or after all parties have had a reasonable opportunity to obtain an attorney, as determined under MCR 2.306(A). ~~Subpoenas shall not be issued except in compliance with MCR 2.306(A)(1). After serving the notice provided for in MCR 2.303(A)(2), 2.306(B), or 2.307(A)(2), a party may have a subpoena issued in the manner provided by MCR 2.506 for the person named or described in the notice. Service on a party or a party's attorney of notice of the taking of the deposition of a party, or of a director, trustee, officer, or employee of a corporate party, is sufficient to require the appearance of the deponent; a subpoena need not be issued.~~ An unrepresented party may move the court for issuance of non-party discovery subpoenas. MCR 2.306(B)(1)-(2) and (C)-(G) apply to a subpoena under this rule. This rule governs discovery from a non-party under MCR 2.303(A)(4), 2.307, 2.310(D) or 2.315. MCR 2.506(A)(2) and (3) apply to any request for production of ESI. A subpoena for hospital records is governed by MCR 2.506(I).

~~(2) The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated documents or other tangible things relevant to the subject matter of the pending action and within the scope of discovery under MCR 2.302(B). The procedures in MCR 2.310 apply to a party deponent.~~

(23) A ~~deposition notice and~~ subpoena ~~under this rule~~ may provide that ~~the deposition~~ it is solely for producing documents or other tangible things for inspection and copying, and that the party does not intend to examine the deponent. The subpoena shall specify whether an inspection is requested or whether the subpoena may be satisfied by delivering a copy of the requested documents. Any request for documents shall indicate that the subpoenaing party will pay reasonable copying costs.

(3) A subpoena shall provide a minimum of 14 days after service of the subpoena (or a shorter time if the court directs) for the requested act. The subpoenaing party may file a motion to compel compliance with the subpoena under MCR 2.313(A). The motion must include a copy of the request and proof of service of the subpoena. The movant must serve the motion on the non-party as provided in MCR 2.105.

(4) A subpoena issued under this rule is subject to the provisions of MCR 2.302(C), and the court in which the action is pending or in which the subpoena is served, on timely motion made by a party or the subpoenaed non-party before the time specified in the subpoena for compliance, may:

(a) quash or modify the subpoena if it is unreasonable or oppressive;

(b) enter an order permitted by MCR 2.302(C); or

(c) ~~condition denial of~~conditionally deny the motion on prepayment by the ~~person~~ party on whose behalf the subpoena is issued of the reasonable cost of producing ~~books, papers,~~ documents~~,~~ or other tangible things.

The non-party's obligation to respond to the subpoena is stayed until the motion is resolved.

(5) Service of a subpoena on the deponent must be made as provided in MCR 2.506(G). A copy of the subpoena must be served on all other parties ~~in the same manner as the deposition notice~~.

(6) In a subpoena for a non-party deposition, a party may name as the deponent a public or private corporation, partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. The subpoena shall be served at least 14 days prior to the scheduled deposition. No later than 10 days of being served with the subpoena, the subpoenaed entity may serve objections, or file a motion for protective order, upon which the party seeking discovery may either proceed on topics as to which there was no objection or move to enforce the subpoena. The organization named must designate one or more officers, directors, managing agents, or other persons, who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons designated shall testify to matters known or reasonably available to the organization.

(7) Upon written request from another party and payment of reasonable copying costs, the subpoenaing party shall provide copies of documents received pursuant to a subpoena.

~~(B) Inspection and Copying of Documents. A subpoena issued under subrule (A) may command production of documents or other tangible things, but the following rules apply:~~

~~(1) The subpoena must be served at least 14 days before the time for production. The subpoenaed person may, not later than the time specified in the subpoena for compliance, serve on the party serving the subpoena written objection to inspection or copying of some or all of the designated materials.~~

~~(2) If objection is made, the party serving the subpoena is not entitled to inspect and copy the materials without an order of the court in which the action is pending.~~

~~(3) The party serving the subpoena may, with notice to the deponent, move for an order compelling production of the designated materials. MCR 2.313(A)(5) applies to motions brought under this subrule.~~

(B~~C~~) Place of ~~Examination~~ Compliance.

~~(1)~~ Except for a subpoena for delivery of copies of documents only under subrule (A)(2), a ~~A deponent~~ non-party served with a subpoena in Michigan may be required to ~~attend an examination~~comply with the subpoena only in the county where the deponent resides, is employed, has its principal place of business or transacts relevant business; or at the location of the things to be inspected or land to be entered; ~~in person~~ or at another convenient place specified by order of the court.

~~(2) In an action pending in Michigan, the court may order a nonresident plaintiff or an officer or managing agent of the plaintiff to appear for a deposition at a designated place in Michigan or elsewhere on terms and conditions that are just, including payment by the defendant of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending.~~

~~(3) If it is shown that the deposition of a nonresident defendant cannot be taken in the state where the defendant resides, the court may~~

~~order the defendant or an officer or managing agent of the defendant to appear for a deposition at a designated place in Michigan or elsewhere on terms and conditions that are just, including payment by the plaintiff of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending.~~

(C~~D~~) Petition to Courts Outside Michigan ~~to Compel Testimony~~. When the place of ~~examination~~ compliance is in another state, territory, or country, the subpoenaing party ~~desiring to take the deposition~~ may petition a court of that state, territory, or country for a subpoena or equivalent process ~~to require the deponent to attend the examination~~.

(D~~E~~) Action Pending in Another Country. An officer or a person authorized by the laws of another country to ~~take a deposition~~ issue a subpoena in Michigan, with or without a commission, in an action pending in a court of that country may submit an application to a court of record in the county in which the ~~deponent~~ subpoenaed person resides, is employed, has its principal place of business, transacts relevant business ~~in person~~, or is found, for a subpoena ~~to compel the deponent to give testimony~~. The court may hear and act on the application with or without notice, as the court directs.

(E~~F~~) [Existing subsection F relettered as E but otherwise unchanged.]

RULE 2.306. DEPOSITIONS ON ORAL EXAMINATION OF A PARTY.

(A) When Depositions May Be Taken; Limits.

(1) Subject to MCR 2.301(A) and these rules, after~~After~~ commencement of the action, a party may take the testimony of a ~~person, including~~ party, by deposition on oral examination. Leave of court, granted with or without notice, must be obtained ~~only~~ if the plaintiff seeks to take a deposition before the defendant has had a reasonable time to obtain an attorney. A reasonable time is deemed to have elapsed if:

(a)-(e) [Unchanged.]

(2) [Unchanged.]

(3) A deposition may not exceed one day of seven hours.

(B) Notice of Examination; ~~Subpoena;~~ Production of Documents and Things.

(1) A party desiring to take the deposition of a ~~person~~ party on oral examination must give reasonable notice in writing to every other party to the action. The notice must state:

(a) the time and place for taking the deposition, and

(b) the name and address of each person to be examined, if known, or, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

~~If the subpoena to be served directs the deponent to produce documents or other tangible things, the designation of the materials to be produced as set forth in the subpoena must be attached to or included in the notice.~~

~~(2) On motion for good cause, the court may extend or shorten the time for taking the deposition. The court may regulate the time and~~

~~order of taking depositions to best serve the convenience of the parties and witnesses and the interests of justice.~~

~~(3) The attendance of witnesses may be compelled by subpoena as provided in MCR 2.305.~~

(2~~4~~) The notice ~~to a party deponent~~ may be accompanied by a request for the production of documents and tangible things at the taking of the deposition. MCR 2.310 applies to the request.

(3~~5~~) In a notice ~~and subpoena~~, a party may name as the deponent a public or private corporation, partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. The notice shall be served at least 14 days prior to the scheduled deposition. No later than 10 days after being served with the notice, the noticed entity may serve objections or file a motion for protective order, upon which the party seeking discovery may either proceed on topics as to which there was no objection or motion, or move to enforce the notice. The organization named must designate one or more officers, directors, or managing agents, or other persons, who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. ~~A subpoena must advise a nonparty organization of its duty to make the designation.~~ The persons designated shall testify to matters known or reasonably available to the organization. This subrule does not preclude taking a deposition by another procedure authorized in these rules.

(C)-(G) [Unchanged.]

RULE 2.307. DEPOSITIONS ON WRITTEN QUESTIONS.

(A) Serving Questions; Notice.

(1) Under the same circumstances and under the same limitations as set out in MCR 2.305(A) and MCR 2.306(A), a party may take the testimony of a person, including a party, by deposition on written questions. The attendance of ~~the~~non-party witnesses may be compelled by the use of a subpoena as provided in MCR 2.305. A deposition on written questions may be taken of a public or private corporation or partnership or association or governmental agency in accordance with the provisions of MCR 2.305(A)(6) or 2.306(B)(3~~5~~).

(2)-(3) [Unchanged.]

(B) [Unchanged.]

RULE 2.309. INTERROGATORIES TO PARTIES.

(A) Availability; Procedure for Service; Limits.

(1) A party may serve on another party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, partnership, association, or governmental agency, by an officer or agent. Subject to MCR 2.302(B), interrogatories ~~Interrogatories~~ may, without leave of court, be served:

(~~1~~a) on the plaintiff after commencement of the action or

(~~2~~b) on a defendant with or after the service of the summons and complaint on that defendant.

(2) Each separately represented party may serve no more than twenty interrogatories upon each party. A discrete subpart of an interrogatory counts as a separate interrogatory.

(B)-(E) [Unchanged in substance; cross-references would be corrected.]

RULE 2.310. REQUESTS FOR PRODUCTION OF DOCUMENTS AND OTHER THINGS; ENTRY ON LAND FOR INSPECTION AND OTHER PURPOSES.

(A) Definitions. For the purpose of this ~~rule~~ subchapter,

(1) "Documents" includes writings, drawings, graphs, charts, photographs, ~~phono records~~ sound recordings, images, and other data or data compilations ~~from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form~~ stored in any medium, including ESI.

(2) "ESI" means electronically stored information, regardless of format, system, or properties.

(3~~2~~) "Entry on land" means entry upon designated land or other property in the possession or control of the person on whom the request is served for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or a designated object or operation on the property, within the scope of MCR 2.302(B).

(B)-(C) [Unchanged.]

~~(D) Request to Nonparty.~~

~~(1) A request to a nonparty may be served at any time, except that leave of the court is required if the plaintiff seeks to serve a request before the occurrence of one of the events stated in MCR 2.306(A)(1).~~

~~(2) The request must be served on the person to whom it is directed in the manner provided in MCR 2.105, and a copy must be served on the other parties.~~

~~(3) The request must~~

~~(a) list the items to be inspected and tested or sampled, either by individual item or by category, and describe each item and category with reasonable particularity,~~

~~(b) specify a reasonable time, place, and manner of making the inspection and performing the related acts, and~~

~~(c) inform the person to whom it is directed that unless he or she agrees to allow the inspection or entry at a reasonable time and on reasonable conditions, a motion may be filed seeking a court order to require the inspection or entry.~~

~~(4) If the person to whom the request is directed does not permit the inspection or entry within 14 days after service of the request (or a shorter time if the court directs), the party seeking the inspection or entry may file a motion to compel the inspection or entry under MCR 2.313(A). The motion must include a copy of the request and proof of service of the request. The movant must serve the motion on the person from whom discovery is sought as provided in MCR 2.105.~~

~~(5) The court may order the party seeking discovery to pay the reasonable expenses incurred in complying with the request by the person from whom discovery is sought.~~

~~(6) This rule does not preclude an independent action against a nonparty for production of documents and other things and permission to enter on land or a subpoena to a nonparty under MCR 2.305.~~

RULE 2.312. REQUEST FOR ADMISSION.

(A) Availability; Scope. Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request. Copies of the documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request must clearly identify in the caption and before each request that it is a Request for Admission. Each matter of which an admission is requested must be stated separately.

(B)-(F) [Unchanged.]

RULE 2.313. FAILURE TO SERVE DISCLOSURE OR TO PROVIDE OR TO PERMIT DISCOVERY; SANCTIONS.

(A) Motion for Order Compelling Disclosure or Discovery. A party, on reasonable notice to other parties and all persons affected, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. A motion for an order under this rule may be made to the court in which the action is pending, or, as to a matter relating to a deposition in, or non-party subpoena served outside of, the county where the action is pending, to a court in ~~the~~ that county ~~or district where the deposition is being taken~~.

(2) Motion.

(a) To Compel Disclosure. If a party fails to serve a disclosure required by MCR 2.302(A), another party may move to compel disclosure and for appropriate sanctions.

(b) To Compel Discovery. If

~~(a)~~(i) a deponent fails to answer a question propounded or submitted under MCR 2.306 or 2.307,

~~(b)~~(ii) a corporation or other entity fails to make a designation under MCR 2.306(B)(3~~5~~) or 2.307(A)(1),

~~(c)~~(iii) a party fails to answer an interrogatory submitted under MCR 2.309(A) and (B), ~~or~~

~~(d)~~(iv) in response to a request for inspection submitted under MCR 2.310, a person fails to respond that inspection will be permitted as requested, or

(v) If a party; an officer, director, or managing agent of a party; or a person designated under MCR 2.306(B)(3) or 2.307(A)(1) to testify on behalf of a party fails to appear before the person who is to take his or her deposition, after being served with a proper notice, the party seeking discovery may move for an order compelling ~~an answer, a designation, or inspection in accordance with the resquest~~ compliance. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(c) To compel compliance with a non-party discovery subpoena. If a recipient of a non-party discovery subpoena under MCR 2.305 fails to comply, the issuing party may move to compel compliance. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. The motion must include a copy of the subpoena and proof of service of the subpoena. The movant must serve the motion on the person from whom discovery is sought as provided in MCR 2.105.

(3) [Unchanged in substance; cross-references would be corrected.]

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subrule an evasive or incomplete disclosure, answer, or response ~~is to~~ must be treated as a failure to disclose, answer, or respond.

(5) Award of Expenses of Motion.

(a) If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—, the court ~~shall~~may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct, or both, to pay to the moving party the reasonable expenses incurred ~~in~~ as a result of the conduct and in ~~obtaining the order~~ making the motion, including attorney fees, unless the court finds that the moving party filed the motion before attempting in good faith to obtain the disclosure or discovery without court action, the opposition to the motion was substantially justified, or ~~that~~ other circumstances make an award ~~of expenses~~ unjust.

(b) If the motion is denied, the court ~~shall~~may, after opportunity for hearing, require the moving party or the attorney advising the motion, or both, to pay to the person who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(c) If the motion is granted in part and denied in part, the court may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and other persons in a just manner.

(6) Additional Sanctions. The court in which the action is pending may order such sanctions as are just. Among others, it may take an action authorized under subrule (B)(2)(a), (b), and (c).

(B) Failure to Comply With Order.

(1) [Unchanged.]

(2) Sanctions by Court in Which Action is Pending.

(a)-(e) [Unchanged.]

In lieu of or in addition to the foregoing orders, the court ~~shall~~ may require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(C) ~~Expenses on~~ Failure to Disclose, Supplement, or Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by MCR 2.302(A) or (E), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(a) may order payment of the reasonable expenses, including attorney fees, caused by the failure;

(b) may inform the jury of the party's failure; and

(c) may impose other appropriate sanctions, including any of the orders listed in MCR 2.313(B)(2)(a)-(c).

(2) Failure to Admit. If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. The court shall enter the order unless it finds that

~~(1)~~(a) the request was held objectionable pursuant to MCR 2.312(B),

~~(2)~~(b) the admission sought was of no substantial importance,

~~(3)~~(c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or

~~(4)~~(d) there was other good reason for the failure to admit.

~~(D) Failure of Party to Attend at Own Deposition, to Serve Answers to Interrogatories, or to Respond to Request for Inspection.~~

~~(1) If a party; an officer, director, or managing agent of a party; or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party fails~~

~~(a) to appear before the person who is to take his or her deposition, after being served with a proper notice;~~

~~(b) to serve answers or objections to interrogatories submitted under MCR 2.309, after proper service of the interrogatories; or~~

~~(c) to serve a written response to a request for inspection submitted under MCR 2.310, after proper service of the request,~~

~~on motion, the court in which the action is pending may order such sanctions as are just. Among others, it may take an action authorized under subrule (B)(2)(a), (b), and (c).~~

~~(2) In lieu of or in addition to an order, the court shall require the party failing to act or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.~~

~~(3) A failure to act described in this subrule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has moved for a protective order as provided by MCR 2.302(C).~~

(D~~E~~) Failure to Preserve ESI. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing~~

~~to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.~~ If ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may order appropriate remedies, including:

(a) a presumption that the lost information was unfavorable to the party;

(b) a jury instruction directing that the jury may or must presume the information was unfavorable to the party; or

(c) dismissal of the action or entry of a default judgment.

RULE 2.314. DISCOVERY OF MEDICAL INFORMATION CONCERNING PARTY.

(A) Scope of Rule. [Unchanged in substance; cross-references would be corrected.]

(B) Privilege; Assertion; Waiver; Effects.

(1) A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's disclosure under 2.302(A), in written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action.

(2) Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information that must be disclosed or is otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

(C)-(E) [Unchanged.]

RULE 2.316. REMOVAL OF DISCLOSURE AND DISCOVERY MATERIALS FROM FILE.

(A) Definition. For the purpose of this rule, "disclosure material" means disclosures under MCR 2.302(A) and "discovery material" means deposition transcripts, audio or video recordings of depositions, interrogatories, documents produced during discovery and made a part of the court file, and answers to interrogatories and requests to admit.

(B) Removal From File. In civil actions, disclosure and discovery materials may be removed from files and destroyed in the manner provided in this rule.

(1) By Stipulation. If the parties stipulate to the removal of disclosure and discovery materials from the file, the clerk may remove the materials and dispose of them in the manner provided in the stipulation.

(2) By the Clerk.

(a) The clerk may initiate the removal of disclosure and discovery materials from the file in the following circumstances.

(i)-(ii) [Unchanged.]

(b) The clerk shall notify the parties and counsel of record, when possible, that disclosure and discovery materials will be removed from the file of the action and destroyed on a specified date at least 28 days after the notice is served unless within that time

(i) the party who filed the disclosure or discovery materials retrieves them from the clerk's office or

(ii) a party files a written objection to removal of disclosure or discovery materials from the file.

If an objection to removal of disclosure or discovery materials is filed, the ~~discovery~~ materials may not be removed unless the court so orders after notice and opportunity for the objecting party to be heard. The clerk shall schedule a hearing and give notice to the parties. The rules governing motion practice apply.

(3) By Order. On motion of a party, or on its own initiative after notice and hearing, the court may order disclosure and discovery materials removed at any other time on a finding that the materials are no longer necessary. However, no disclosure or discovery materials may be destroyed by court personnel or the clerk until the periods set forth in subrule (2)(a)(i) or (2)(a)(ii) have passed.

RULE 2.401. PRETRIAL PROCEDURES; CONFERENCES; SCHEDULING ORDERS.

(A) [Unchanged.]

(B) Early Scheduling Conference and Order.

(1) Early Scheduling Conference. The court may direct that an early scheduling conference be held. ~~In addition to those considerations enumerated in subrule (C)(1), d~~During this conference the court should consider any matters that will facilitate the fair and expeditious disposition of the action, including:

(a)-(c) [Unchanged.]

(d) disclosure, discovery, preservation, and claims of privilege of ~~electronically stored information~~ESI;

(e) the simplification of the issues;

(f) the amount of time necessary for discovery, staging of discovery, and any modification to the extent of discovery;

(g) the necessity or desirability of amendments to the pleadings;

(h) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;

(i) the form and content of the pretrial order;

(j) the timing of disclosures under MCR 2.302(A);

(k) the limitation of the number of expert witnesses, whether to have a separate discovery period for experts, whether to require preparation and disclosure of testifying expert reports, and whether to specify expert disclosure deadlines;

(l) the consolidation of actions for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;

(m) the possibility of settlement;

(n) whether mediation, case evaluation, or some other form of alternative dispute resolution would be appropriate for the case, and what mechanisms are available to provide such services;

(o) the identity of the witnesses to testify at trial;

(p) the estimated length of trial;

(q) whether all claims arising out of the transaction or occurrence that is the subject matter of the action have been joined as required by MCR 2.203(A); and

(r) other matters that may aid in the disposition of the action.

(2) Scheduling Order.

(a) At an early scheduling conference under subrule (B)(1)~~, a pretrial conference under subrule (C)~~, or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events and adopt other provisions the court deems appropriate, including

(i)-(ii) [Unchanged.]

(iii) what, if any, changes should be made in the timing, form, or requirement for disclosures under MCR 2.302(A),

(iv) what, if any, changes should be made to the limitations on discovery imposed under these rules and whether other presumptive limitations should be established,

~~(iii)~~(v) the completion of discovery,

~~(iv)~~(vi) the exchange of witness lists under subrule ~~(I)~~(H)(2)(h), and

~~(v)~~(vii) the scheduling of a pretrial conference, a settlement conference, or trial.

More than one such order may be entered in a case.

(b) [Unchanged.]

(c) The scheduling order also may include provisions concerning initial disclosure, discovery of ~~electronically stored information~~ESI, any agreements the parties reach for asserting claims of privilege or for protection as trial-preparation material after production, preserving discoverable information, and the form in which ~~electronically stored information~~ESI shall be produced.

(d) [Unchanged.]

(C) Discovery Planning.

(1) Upon court order or written request by another party, the parties must confer among themselves and prepare a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared are jointly responsible for arranging the conference and for attempting in good faith to agree on a proposed discovery plan.

(2) A proposed discovery plan must address all disclosure and discovery matters, including the matters set forth in subrule (B), and propose deadlines for completion of disclosure and discovery. The parties must show good cause to request a change in deadlines set by a scheduling order.

(3) A discovery plan, noting any disagreements between the parties, may be submitted to the court as part of a stipulation or motion. The court may enter an order governing disclosure, discovery, and any other case management matter the court deems appropriate.

(4) If a party or attorney fails to participate in good faith in developing and submitting a proposed discovery plan, the court may enter an appropriate sanction, including payment of attorney fees and costs caused by the failure.

~~(C) Pretrial Conference; Scope.~~

~~(1) At a conference under this subrule, in addition to the matters listed in subrule (B)(1), the court and the attorneys for the parties may consider any matters that will facilitate the fair and expeditious disposition of the action, including:~~

~~(a) the simplification of the issues;~~

~~(b) the amount of time necessary for discovery;~~

~~(c) the necessity or desirability of amendments to the pleadings;~~

~~(d) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;~~

~~(e) the limitation of the number of expert witnesses;~~

~~(f) the consolidation of actions for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;~~

~~(g) the possibility of settlement;~~

~~(h) whether mediation, case evaluation, or some other form of alternative dispute resolution would be appropriate for the case, and what mechanisms are available to provide such services;~~

~~(i) the identity of the witnesses to testify at trial;~~

~~(j) the estimated length of trial;~~

~~(k) whether all claims arising out of the transaction or occurrence that is the subject matter of the action have been joined as required by MCR 2.203(A);~~

~~(l) other matters that may aid in the disposition of the action.~~

~~(2) Conference order. If appropriate, the court shall enter an order incorporating agreements reached and decisions made at the conference.~~

(D)-(G) [Unchanged.]

(H) ~~Conference After Discovery.~~ Final Pretrial Conference and Order.

(1) If the court finds at a final pretrial conference ~~held after the completion of discovery~~that due to a lack of reasonable diligence by a party the action is not ready for trial, the court may enter an appropriate order to facilitate preparation of the action for trial and may require the offending party to pay the reasonable expenses, including attorney fees, caused by the lack of diligence.

(2) The court may hold a final pretrial conference to facilitate preparation of the action for trial and to formulate a trial plan. The conference may be combined with a settlement conference. At least one lead attorney who will conduct the trial for each party and any unrepresented party shall attend the conference. At the conference the parties may discuss the following, and the court may order the parties to prepare, either before or after the conference, a joint final pretrial order that may provide for:

(a) scheduling motions in limine;

(b) a concise statement of plaintiff's claims, including legal theories;

(c) a concise statement of defendant's defenses and claims, including crossclaims and claims of third-party plaintiffs, and defenses of cross defendants or third-party defendants, including legal theories;

(d) a statement of any stipulated facts or other matters;

(e) issues of fact to be litigated;

(f) issues of law to be litigated;

(g) evidence problems likely to arise at trial;

(h) a list of witnesses to be called unless reasonable notice is given that they will not be called, and a list of witnesses that may be called, listed by category as follows:

i. live lay witnesses;

ii. lay deposition transcripts or videos including resolving objections and identifying portions to be read or played;

iii. live expert witnesses; and

iv. expert deposition transcripts or videos including resolving objections and identifying portions to be read or played.

(i) a list of exhibits with stipulations or objections to admissibility;

(j) an itemized statement of damages and stipulations to those items not in dispute;

(k) estimated length of trial:

i. time for plaintiff's proofs;

ii. time for defendant's proofs; and

iii. whether it is a jury or nonjury trial.

(l) trial date and schedule;

(m) whether the parties will agree to arbitration;

(n) a statement that counsel have met, conferred and considered the possibility of settlement and alternative dispute resolution, giving place, time and date and the current status of these negotiations as well as plans for further negotiations;

(o) rules governing conduct of trial;

(p) jury instructions;

(q) trial briefs;

(r) voir dire; and

(s) any other appropriate matter.

(I) [Unchanged.]

(J) ESI Conference, Plan and Order.

(1) ESI Conference. Where a case is reasonably likely to include the discovery of ESI, parties may agree to an ESI Conference, the judge may order the parties to hold an ESI Conference, or a party may file a motion requesting an ESI Conference. At the ESI Conference, the parties shall consider:

(a) any issues relating to preservation of discoverable information, including adoption of a preservation plan for potentially relevant ESI;

(b) identification of potentially relevant types, categories, and time frames of ESI;

(c) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible;

(d) disclosure of the manner in which ESI is maintained;

(e) implementation of a preservation plan for potentially relevant ESI;

(f) the form in which each type of ESI will be produced;

(g) what metadata, if any, will be produced;

(h) the time to produce ESI;

(i) the method for asserting or preserving claims of privilege or protection of trial preparation materials, including whether such claims may be asserted after production;

(j) privilege log format and related issues

(k) the method for asserting or preserving confidential and proprietary status of information either of a party or a person not a party to the proceeding;

(l) whether allocation among the parties of the expense of production is appropriate; and

(m) any other issue related to the discovery of ESI.

(2) ESI Discovery Plan. Within 14 days after an ESI Conference, the parties shall file with the court an ESI discovery plan and a statement concerning any issues upon which the parties cannot agree. Unless the parties agree otherwise, the attorney for the plaintiff shall be responsible for submitting the ESI discovery plan to the court. The ESI discovery plan may include:

(a) a statement of the issues in the case and a brief factual outline;

(b) a schedule of discovery including discovery of ESI;

(c) a defined scope of preservation of information and appropriate conditions for terminating the duty to preserve prior to the final resolution of the case;

(d) the forms in which ESI will be produced; and

(e) the sources of any ESI that are not reasonably accessible because of undue burden or cost.

(3) ESI Competence. Attorneys who participate in an ESI Conference or who appear at a conference addressing ESI issues must be sufficiently versed in matters relating to their clients' technological systems to competently address ESI issues; counsel may bring a client representative or outside expert to assist in such discussions.

(4) ESI Order. The court may enter an order governing the discovery of ESI pursuant to the parties' ESI discovery plan, upon motion of a party, by stipulation of the parties, or on its own.

RULE 2.410. MEDIATION.

(A)-(G) [Unchanged.]

(H) Mediation of Discovery Disputes. The parties may stipulate to or the court may order the mediation of discovery disputes (unless precluded by MCR 3.216(C)(3)). The discovery mediator may by agreement of the parties be the same mediator otherwise selected under subrule (B). All other provisions of this rule shall apply to a discovery mediator except:

(1) The order under subrule (C)(1) will specify the scope of issues or motions referred to the discovery mediator, or whether the mediator is appointed on an ongoing basis.

(2) The mediation sessions will be conducted as determined by the mediator, with or without parties, in any manner deemed reasonable and consistent with these rules and any court order.

(3) The court may specify that discovery disputes must first be submitted to the mediator before being filed as a motion unless there is a need for expedited attention by the court. In such cases, the moving party shall certify in the motion that it is filed only after failure to resolve the dispute through mediation or due to a need for immediate attention by the court.

(4) In cases involving complex issues of ESI, the court may appoint an expert under MRE 706. By stipulation of the parties, the court may also designate the expert as a discovery mediator of ESI issues under this rule, in which case the parties should address in the order appointing the mediator whether the restrictions of MCR 2.411(C)(3) and 2.412(D) should be modified to expand the scope of permissible communications with the court.

RULE 2.506. SUBPOENA; ORDER TO ATTEND.

(A) Attendance of Party or Witness.

(1) The court in which a matter is pending may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time certain and from time to time and day to day thereafter until excused by the court, and/or to produce ~~notes, records,~~ documents, ~~photographs,~~ or other portable tangible things ~~as specified~~. A request for documents or tangible things under this rule must comply with MCR 2.302(B) and any scheduling order. A person or entity subpoenaed under this rule may file written objections to the request for documents before the designated time for appearance; such objections shall be adjudicated under subrule (H). This subrule does not apply to discovery subpoenas (MCR 2.305) or requests for documents to a party where discovery is available (MCR 2.310). A copy of any subpoena for documents or tangible things shall be provided to the opposing party or his/her counsel.

(2) A subpoena may specify the form or forms in which ~~electronically stored information~~ ESI is to be produced, subject to objection. If the

subpoena does not so specify, the person responding to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it, or in a form or forms that are reasonably usable. A person producing ~~electronically stored information~~ ESI need only produce the same information in one form.

(3) A person responding to a subpoena need not provide discovery of ~~electronically stored information~~ ESI from sources that the person identifies as not reasonably accessible because of undue burden or cost. In a hearing or submission under subrule (H), the person responding to the subpoena must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for such discovery, including who bears the cost.

(4)-(5) [Unchanged.]

(B) [Unchanged.]

(C) Notice to Witness of Required Attendance.

(1) The signer of a subpoena must issue it for service on the witness sufficiently in advance of the trial or hearing to give the witness reasonable notice of the date and time the witness is to appear. Unless the court orders otherwise, the subpoena must be served at least 2 days before the ~~witness is to~~ appearance or 14 days before the appearance when documents are requested.

(2)-(3) [Unchanged.]

(D) Form of Subpoena. A subpoena must:

(1)-(5) [Unchanged.]

(6) state the file number ~~designation~~ assigned by the court; and

(7) [Unchanged.]

The state court administrator shall develop and approve a subpoena form for statewide use.

(E) [Unchanged.]

(F) Failure of Party to Attend. If a party or an officer, director, or managing agent of a party fails to attend or produce documents or other tangible evidence pursuant to a subpoena or an order to attend without having served written objections, the court may:

(1)-(6) [Unchanged.]

(G) [Unchanged.]

(H) Hearing on Subpoena or Order To Attend.

(1) A person served with a subpoena or order to attend under this rule may appear before the court in person or by writing to explain why the person should not be compelled to comply with the subpoena, order to attend, or directions of the party having it issued.

(2)-(3) [Unchanged.]

(4) A person must comply with the command of a subpoena unless relieved by order of the court or written direction of the person who had the subpoena issued except that any obligation to produce documents, if timely written objections are served, is stayed pending resolution under this subrule.

(5) Any party may move to quash or modify a subpoena by motion under MCR 2.302(C) filed before the time specified in the subpoena, and serve same upon the nonparty, in which case the non-party's obligation to respond is stayed until the motion is resolved.

(I) [Unchanged.]

RULE 3.201. APPLICABILITY OF RULES.

(A)-(B) [Unchanged.]

(C) Except as otherwise provided in this subchapter, practice and procedure in domestic relations actions is governed by other applicable provisions of the Michigan Court Rules, except the number of interrogatories set forth in MCR 2.309(A)(2) shall be thirty-five.

(D) [Unchanged.]

RULE 3.206. PLEADING.

(A) [Unchanged.]

(B) Verified Statement and Disclosure Form.

(1) [Unchanged.]

(2) Verified Financial Information Form. Unless waived in writing by the parties, or unless a settlement agreement or consent judgment of divorce or other final order disposing of the case has been signed by both parties at the time of filing, and except as set forth below, each party must serve a Verified Financial Information Form (as provided by SCAO) within 28 days following the date of service of defendant's initial responsive pleading. If a party is self-represented and his or her address is not disclosed due to domestic violence, the parties' disclosure forms will be exchanged at the first scheduled matter involving the parties or in another manner as specified by the court or stipulated to by the parties. A party who is a victim of domestic violence, sexual assault or stalking by another party to the case, may omit any information which might lead to the location of where the victim lives or works, or where a minor child may be found. Failing to provide this disclosure may be addressed by the court or by motion consistent with MCR 2.313. The disclosure form does not preclude other discovery. A proof of service must be filed when disclosure forms are served.

(~~2~~3) The information in the ~~verified~~ statements and disclosure forms is confidential, and is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order. For good cause, the addresses of a party and minors may be omitted from the copy of the statement or disclosure forms that is served on the other party.

(~~3~~4) If any of the information required to be in the ~~verified~~ statements or disclosure forms is omitted, the party seeking relief must explain the reasons for the omission in a sworn affidavit, to be filed with the court by the due date of the statement or disclosure form.

(5) A party who has served a disclosure form must supplement or correct its disclosure as ordered by the court or otherwise in a timely manner if the party learns that in some material respect the disclosure form is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the action or in writing.

(C) Attorney Fees and Expenses.

(1) [Unchanged.]

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that:

(a) the party is unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter, and that the other party is able to pay or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply, or engaged in discovery practices in violation of these rules.

RULE 3.XXX. FILING MATERIALS IN COURT.

(A) No party or interested party shall file the following items with the court unless in conformity with this rule:

(1) verified statements and disclosure forms under MCR 3.206(B);

(2) child protective services reports;

(3) psychological evaluations;

(4) custody evaluations;

(5) medical, mental health, and academic records of a minor;

(6) any part of a confidential file under MCR 3.903(A)(3);

(7) any item otherwise designated as confidential or barred from filing by these rules; and

(8) any other document which, in the court's discretion, should not be part of the public record.

(B) Any item specified in subrule (A) shall only be filed with the court "under seal" pursuant to an order of the court which shall specify adequate means to prevent unauthorized access.

RULE 3.922. PRETRIAL PROCEDURES IN DELINQUENCY AND CHILD PROTECTION PROCEEDINGS.

(A) Discovery.

(1) The following materials are discoverable as of right in all proceedings and shall be produced no less than 21 days before trial, even without a discovery request~~provided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate~~:

(a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;

(b) all written or recorded ~~nonconfidential~~ statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including, but not limited to, police reports, allegations of neglect and/or abuse on Form 3200, and Child Protective Services investigation reports, except that the identity of the reporting person shall be protected in accordance with MCL 722.625;

(c) the names of all prospective witnesses;

(d) a list of all prospective exhibits;

(e) a list of all physical or tangible objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency;

(f) the results of all scientific, medical, psychiatric, psychological, or other expert tests, ~~or~~ experiments, or evaluations, including the reports or findings of all experts, that are relevant to the subject matter of the petition;

(g) the results of any lineups or showups, including written reports or lineup sheets; ~~and~~

(h) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories.;

(i) any written, video, or recorded statement that pertains to the case and made by a witness whom the party may call at trial;

(j) the curriculum vitae of an expert the party may call at trial and either a report prepared by the expert containing, or a written description of, the substance of the proposed testimony of the expert, the expert's opinion, and the underlying bases of that opinion; and

(k) any criminal record that the party may use at trial to impeach a witness.

(2)-(3) [Unchanged.]

(4) Failure to comply with subrules (A)(1) and (A)(2) may result in such sanctions~~, as applicable, as set forth in~~ in keeping with those assessable under MCR 2.313.

(B) Discovery and Disclosure in Delinquency Matters.

(1) In delinquency matters, in addition to disclosures required by provisions of law and as required or allowed by subrule (A)(1)-(3), a party shall provide all other parties the following, which are discoverable as of right and, even without a discovery request, shall be produced no less than 21 days before trial:

(a) a description or list of criminal convictions, known to the respondent's attorney or prosecuting attorney, of any witness whom the party may call at trial;

(b) any exculpatory information or evidence known to the prosecuting attorney;

(c) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case even if that person is not a prospective witness at trial; and

(d) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(2) In delinquency matters, notwithstanding any other provision of this rule, there is no right to have disclosed or to discover information or evidence that is protected by constitution, statute, or privilege, including information or evidence protected by a respondent's right against self-incrimination, except as provided in subrule (B)(3).

(3) In delinquency matters, if a respondent demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain

material information necessary to the defense, the court shall conduct an in camera inspection of the records.

(a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the court shall suppress or strike the privilege holder's testimony.

(b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to respondent's counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the court shall suppress or strike the privilege holder's testimony.

(c) Regardless of whether the court determines that the records should be made available to the respondent, the court shall make findings sufficient to facilitate meaningful appellate review.

(d) The court shall seal and preserve the records for review in the event of an appeal:

(i) by the respondent, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense or

(ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.

(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide.

(f) Excision. When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal.

(4) At delinquency dispositions, reviews, designation hearings, hearings on alleged violation of court orders or probation, and detention hearings, the following shall be provided to the respondent, respondent's counsel, and the prosecuting attorney no less than seven (7) days before the hearing:

(a) assessments and evaluations to be considered by the court during the hearing;

(b) documents including but not limited to police reports, witnesses statements, reports prepared by probation officers, reports prepared by intake officers, and reports prepared by placement/ detention staff to be considered by the court during the hearing; and

(c) predisposition reports and documentation regarding recommendations in the report including but not limited to documents regarding restitution.

(5) Failure to comply with subrules (B)(1) and (B)(4) may result in sanctions in keeping with those assessable under MCR 2.313.

[(B)-(E) unchanged but relettered (C)-(F).]

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(D) [Unchanged.]

(E) Evidence; Reports.

(1)-(4) [Unchanged.]

(5) Reports in the Agency's case file, including but not limited to case services plans, treatment plans, substance abuse evaluations, psychological evaluations, therapists' reports, drug and alcohol screening results, contracted service provider reports, and parenting time logs shall be provided to the court and parties no less than seven (7) days before the hearing.

(65) The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

(F)-(H) [Unchanged.]

RULE 3.975. POST-DISPOSITIONAL PROCEDURES; CHILD IN FOSTER CARE.

(A)-(D) [Unchanged.]

(E) Procedure. Dispositional review hearings must be conducted in accordance with the procedures and rules of evidence applicable to the initial dispositional hearing. The Agency shall provide to all parties all reports in its case file, including but not limited to initial and updated case service plans, treatment plans, psychological evaluations, psychiatric evaluations, substance abuse evaluations, drug and alcohol screens, therapists' reports, contracted service provider reports, and parenting time logs. The reports shall be provided to the parties at least seven (7) days before the hearing. The reports that are filed with the court must be offered into evidence. ~~The report of the agency that is filed with the court must be accessible to the parties and offered into evidence.~~ The court shall consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing. The court, on request of a party or on its own motion, may accelerate the hearing to consider any element of a case service plan. The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

(F)-(H) [Unchanged.]

RULE 3.976. PERMANENCY PLANNING HEARINGS.

(A)-(C) [Unchanged.]

(D) Hearing Procedure; Evidence.

(1)-(3) [Unchanged.]

(4) Written reports in the Agency case file, including but not limited to case service plans, treatment plans, substance abuse evaluations, psychological evaluations, therapists' reports, drug and alcohol screens, contracted service provider reports, and parenting time logs, shall be provided to the court and parties no less than seven (7) days before the hearing.

(E) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(E) [Unchanged.]

(F) Termination of Parental Rights on the Basis of Different Circumstances. The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.

(1) [Unchanged.]

(2) Discovery and Time for Disclosures and Hearing on Petition. Parties shall make disclosures as detailed in MCR 3.922(A) at least 21 days prior to the termination hearing and have rights to discovery consistent with that rule. The hearing on a supplemental petition for termination of parental rights under this subrule shall be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days.

(G) [Unchanged.]

(H) Termination of Parental Rights; Other. If the parental rights of a respondent over the child were not terminated pursuant to subrule (E) at the initial dispositional hearing or pursuant to subrule (F) at a hearing on a supplemental petition on the basis of different circumstances, and the child is within the jurisdiction of the court, the court must, if the child is in foster care, or may, if the child is not in foster care, following a dispositional review hearing under MCR 3.975, a progress review under MCR 3.974, or a permanency planning hearing under MCR 3.976, take action on a supplemental petition that seeks to terminate the parental rights of a respondent over the child on the basis of one or more grounds listed in MCL 712A.19b(3).

(1) [Unchanged.]

(2) Discovery, Prehearing Disclosures, and Evidence. Parties shall make disclosures as detailed in MCR 3.922(A) at least 21 days prior to the termination hearing and have rights to discovery consistent with that rule. The Michigan Rules of Evidence do not apply at the hearing, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports received by the court and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

(3) [Unchanged.]

(I)-(K) [Unchanged.]

RULE 5.131. DISCOVERY GENERALLY.

(A) Civil Actions. ~~The general discovery rules apply in probate proceedings.~~

~~(B) Scope of Discovery in Probate Proceedings. Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court.~~ Discovery for civil actions in probate court is governed by subchapter 2.300.

(B) Proceedings.

(1) Discovery in General. With the exception of mandatory initial disclosures under MCR 2.302(A), the discovery rules in subchapter 2.300 apply in probate proceedings, and, except as otherwise ordered by the court, any interested person in a probate proceeding is considered a party for the purpose of applying discovery rules.

(2) Mandatory Initial Disclosure.

(a) Demand or Objection. Mandatory disclosures under MCR 2.302(A) are required in probate proceedings if, by the time of the first hearing on the petition initiating the proceeding:

(i) an interested person other than the petitioner files a demand for mandatory initial disclosure and properly serves the demand on all interested persons or

(ii) an interested person objects to or otherwise contests the petition, in writing or orally, properly serves any written objection or response on all interested persons, and the judge determines mandatory initial disclosure is appropriate.

When mandatory initial disclosures are required through demand or objection, and except as otherwise ordered by the court, such disclosures must be made by the petitioner and any demandant or objecting interested person.

(b) Court Order. At any time, on its own motion or on a motion filed by an interested person, the court may require:

(i) mandatory disclosures and designate those interested persons who must make disclosures or

(ii) in a proceeding with some parties already making disclosures, an additional interested person or persons to make disclosures.

(c) Time for Initial Disclosures.

(i) The petitioner must serve initial disclosures within 14 days after the first scheduled hearing on the petition subject to a demand or objection.

(ii) The demandant or objecting interested person must serve initial disclosures within the later of 14 days after the petitioner's disclosures are due or 28 days after the demand or objection is filed.

(iii) When mandatory disclosures are ordered pursuant to MCR 5.131(B)(2)(b)(ii), an interested person's disclosures are due within 21 days after the court's order.

(3) Scope of Discovery in Probate Proceedings. Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court.

Staff Comment: This proposal was created by special committee of the State Bar of Michigan and approved for submission to the Court by the Bar's Representative Assembly. The proposal would require mandatory discovery disclosure in many cases, implement a presumptive limit on interrogatories (20 in most cases, but 35 in domestic relations proceedings) and limit a deposition to 7 hours. The proposal also would update the rules to more specifically address issues related to electronically stored information, and would encourage early action on discovery issues during the discovery period. The special committee's report, which provides substantial background on the process and information regarding the reasoning for many of the proposed changes, is being published in conjunction with this publication order.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-19. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 28, 2018:

PROPOSED AMENDMENT OF MCR 6.001.

On order of the Court, this is to advise that the Court is considering amendment of MCR 6.001. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.201, 6.202, 6.425(E)(3), 6.427, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.001 would allow for discovery in criminal cases heard in district court to the same extent that it is available for criminal cases heard in circuit court. The proposal was submitted by the Michigan District Judges Association. The MDJA noted that although many prosecutors provide discovery, there is no rule mandating it. The MDJA also noted that if the general discovery rule (MCR 6.201) is made applicable to district court criminal cases, subsection (I) could be used to limit its application where full-blown discovery may not be appropriate.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-23. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered December 12, 2018:

PROPOSED AMENDMENTS OF MCR 1.109 AND 8.119, RESCISSION OF ADMINISTRATIVE ORDER 2006-2, AND AMENDMENT OF ADMINISTRATIVE ORDER NO. 1999-4.

On order of the Court, this is to advise that the Court is considering amendments of MCR 1.109, MCR 8.119, AO No. 1999-4, and rescission of AO No. 2006-2. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1) Form and Captions of Documents.

(a) [Unchanged.]

(b) The first part of every document must contain a caption stating:

(i)-(v) [Unchanged.]

(vi) the name~~, an address, and telephone number~~ of each party appearing without an attorney and an address for each party where documents can be served on that party.

(c)-(f) [Unchanged.]

(g) Pursuant to ~~Administrative Order No. 2006-2~~subrule (D)(9) a filer is prohibited from filing a document that contains~~ another person's social security number except when the number is required or allowed by statute, court rule, court order, or for purposes of collection activity when it is required for identification.~~protected personal identifying information.

(2)-(8) [Unchanged.]

(9) Personal Identifying Information. Personal identifying information is classified as protected or nonprotected.

(a) Protected Personal Identifying Information. The following personal identifying information is protected and shall not be included in any public document or attachment filed with the court except as provided by these rules:

(i) date of birth,

(ii) social security number or national identification number,

(iii) driver's license number or state-issued personal identification card number,

(iv) passport number,

(v) financial account numbers, and

(vi) home or personal telephone numbers.

(b) All protected personal identifying information required by law or court rule to be filed with the court must be provided in the form and manner established by the State Court Administrative Office. Protected personal identifying information provided under this subrule is nonpublic and available only to the parties to the case and other legally defined interested persons as required for case activity or as otherwise authorized by law or these court rules. The parties may stipulate in writing to allow access to protected personal identifying information to any person.

(c) If law or court rule requires protected personal identifying information to be included in a public document filed with the court, it must be provided in the following format:

(i) Date of Birth. Only the year may be included in the following format: XX/XX/1998.

(ii) Social Security Number. Only the last four digits may be included in the following format: XXX-XX-1234.

(iii) Driver's License Number or State-Issued Personal Identification Card Number. Only the last four digits may be included in the following format: X-XXX-XXX-XX1-234.

(iv) Passport Number. Only the last three digits may be included in the following format: XXXXXX123.

(v) Financial Account Numbers. Only the last four digits may be included in the following format: XXXXX1234.

(vi) Home and Personal Telephone Numbers. Only the last four digits may be included in the following format: XXX-XXX-1234.

(d) If a party is required to file a public document containing protected personal identifying information listed in subrule (a) or (b), the party may file a redacted document for the public file along with a confidential reference list on a form approved by the State Court Administrative Office. The confidential reference list must identify each item of redacted information and specify an appropriate reference that uniquely corresponds to each item of redacted information listed. All references in the case to the redacted identifiers included in the confidential reference list will be understood to refer to the corresponding complete identifier. A party may amend the reference list as of right.

(e) If an exhibit offered for hearing or trial contains personal identifying information that is defined as protected personal identifying information in this rule or may be considered personal identifying information by a party, the party offering the exhibit is not required to redact the information. However, the person to whom the information pertains may request that the court redact the personal identifying information under subrule (10).

(f) Failure to Comply.

(i) A party waives the protection of personal identifying information as to the party's own protected information by filing it in a public document and not providing it in the form and manner established under this rule.

(ii) If a party fails to comply with the requirements of this rule, the court may, upon motion or its own initiative, seal the improperly filed documents and order new redacted documents to be prepared and filed.

(iii) If a party fails to comply with the requirements of this rule in regard to another person's protected information, the court may impose reasonable expenses, including attorney fees and costs, or may sanction the conduct as contempt.

(g) Protected personal identifying information provided to the court as required by subrule (c) shall be entered into the court's case management system in accordance with standards established by the State Court Administrative Office. The information shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history under MCR 8.119(D)(1).

(10) Request for Copy of Public Document with Protected Personal Identifying Information; Redacting Personal Identifying Information; Responsibility; Certifying Original Record; Other.

(a) The responsibility for excluding or redacting protected personal identifying information listed in subrule (9) from all documents filed with or offered to the court rests solely with the parties and their attorneys. The clerk of the court will not review, redact, or screen documents for personal identifying information, protected or otherwise, whether filed electronically or on paper, except in accordance with this subrule.

(b) Dissemination of protected personal identifying information by the courts is restricted to the purposes for which its use is authorized by federal or state law or court rule. When a court receives a request for copies of any public document filed on or after January 1, 2021, the court must review the document and redact all protected personal identifying information. This requirement does not apply to certified copies or true copies when they are required by law, or copies made for those uses for which the personal identifying information was provided.

(c) Redacting Personal Identifying Information.

(i) Protected personal identifying information contained in a document and filed with the court shall be redacted by the clerk of the court on written request by the person to whom it applies. The clerk of the court shall process the request promptly. The request does not require a motion fee, must specify the protected personal identifying information to be redacted, shall be maintained in the case file, and is nonpublic.

(ii) Except as provided in subrule (i), a party or a person whose personal identifying information is in a public document filed with the court may file an ex parte motion asking the court to direct the clerk to redact the information from that document or to make the information either confidential or nonpublic. The court may schedule a hearing on the motion at its discretion. The motion and order shall be on a form approved by the state court administrative office.

(iii) A party or interested person whose protected personal identifying information is in an exhibit offered for hearing or trial may file a written request before the hearing or trial that the information be redacted. The judge shall determine whether the request should be granted.

(d) Certifying a Record. The clerk of the court may certify a redacted record as a true copy of an original record on file with the court by stating that information has been redacted in accordance with law or court rule, or sealed as ordered by the court.

(e) Maintenance of Redacted or Restricted Access Personal Identifying Information. A document from which personal identifying information has been redacted shall be maintained in accordance with standards established by the State Court Administrative Office.

(E)-(G) [Unchanged.]

(H) Definitions. The following definitions apply to case records as defined in MCR 8.119(D) and (E).

(1) "Confidential" means that a case record is nonpublic and accessible only to those individuals or entities specified in statute or court rule. A confidential record is accessible to parties only as specified in statute or court rule.

(2) "Nonpublic" means that a case record is not accessible to the public. A nonpublic case record is accessible to parties and only those other individuals or entities specified in statute or court rule. A record may be made nonpublic only pursuant to statute or court rule. A court may not make a record nonpublic by court order.

(3) "Redact" means to obscure individual items of information within an otherwise publicly accessible document.

(4) "Redacted document" means a copy of an original document in which items of information have been redacted.

(5) "Sealed" means that a document or portion of a document is sealed by court order pursuant to MCR 8.119(I). Except as required by statute, an entire case may not be sealed.

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(C) [Unchanged.]

(D) [Unchanged.]

(1) [Unchanged.]

(a) Case History. The clerk shall create and maintain a case history of each case, known as a register of actions, in the court's automated case management system. The automated case management system shall be capable of chronologically displaying the case history for each case and shall also be capable of searching a case by number or party name (previously known as numerical and alphabetical indices) and displaying the case number, date of filing, names of parties, and names of any attorneys of record. The case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court Records Management Standards. Each entry shall be brief, but shall show the nature of each item filed, each order or judgment of the court, and the returns showing execution. Each entry shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action. Protected personal identifying information entered into the court's case management system as required by MCR 1.109(D)(9)(d) shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history, including when transferred to the Archives of Michigan pursuant to law.

(b) [Unchanged.]

(E)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk shall not permit any case record to be taken from the court without the order of the court. A court may provide access to the public case history information through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039.;

~~however,~~ If a request is made for a public record that is maintained electronically, the court is required to provide a means for access to that record ~~other public information in its case files may be provided through electronic means only upon request~~; however, the documents cannot be provided through a publicly accessible website if protected personal identifying information has not been redacted from those documents. The court may provide access to any case record that is not available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(D), in a medium for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(I)-(L) [Unchanged.]

ADMINISTRATIVE ORDER NO. 1999-4—ESTABLISHMENT OF MICHIGAN TRIAL COURT ~~CASE FILE~~RECORDS MANAGEMENT STANDARDS.

In order to improve the administration of justice; to improve the service to the public, other agencies, and the judiciary; to improve the performance and efficiency of Michigan trial court operations; ~~and~~ to enhance the trial courts' ability to ~~preserve~~create and maintain an accurate record of the trial courts' proceedings, decisions, orders, and judgments pursuant to statute and court rule, it is ordered that the State Court Administrator establish Michigan Trial Court ~~Case File~~Records Management Standards for data, case records, and other court records and that trial courts conform to those standards. The State Court Administrative Office ~~shall~~must enforce the standards and assist courts in adopting practices to conform to those standards.

Case records under MCR 8.119(D) must be made available electronically to the same extent they are available at the courthouse, provided that certain personal data identifiers are not available to the public. In order to protect privacy and address security concerns, it is ordered that protected personal identifying information, as defined in court rule, filed with the state courts of Michigan in any form or manner and for any purpose must be nonpublic. The State Court Administrative Office must establish standards and develop court forms that ensure all protected personal identifying information necessary to a given court case is provided to the court separately from filed documents except as otherwise required by law.

Staff Comment: The proposed amendments would make certain personal identifying information nonpublic and clarify the process regarding redaction.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the

Supreme Court Clerk in writing or electronically by April 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-28. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered December 12, 2018:

PROPOSED ADOPTION OF MCR 3.22X.

On order of the Court, this is to advise that the Court is considering adoption of new Rule 3.22X relating to Friend of the Court ADR. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[This is a proposed new rule.]

RULE 3.22X. FRIEND OF THE COURT ALTERNATIVE DISPUTE RESOLUTION.

(A) Friend of the Court Alternative Dispute Resolution Plan. The chief judge of each circuit court shall submit a friend of the court alternative dispute resolution (ADR) plan to the State Court Administrative Office (SCAO) for approval as a local administrative order. The plan shall:

(1) Require the use of the domestic violence screening protocol provided by the SCAO to identify domestic violence, the existence of a protection order as defined in MCL 552.513 between the parties or other protective order, child abuse or neglect, and other safety concerns. The plan shall provide a method to address those concerns.

(2) State the circumstances under which the friend of the court may exclude a case from friend of the court ADR under subrule (D)(2).

(3) Designate the matters each friend of the court ADR process will address, subject to subrule (C)(1).

(4) Designate which friend of the court ADR processes are used in prejudgment or postjudgment friend of the court domestic relations cases.

(5) Designate the manner in which the friend of the court will conduct each process.

(6) Specify how cases are referred to friend of the court ADR.

(7) Address how the court complies with the training, qualifications, and confidentiality provisions for friend of the court ADR processes established by the SCAO pursuant to subrule (J).

(8) Provide that attorneys of record will be allowed to attend all friend of the court ADR processes.

(9) Set forth any additional procedures, standards, training, qualifications, and confidentiality requirements of any other friend of the court ADR process the court uses other than those processes set forth in this rule.

(B) Definitions. When used in this rule, unless the context indicates otherwise:

(1) "Domestic violence" means the presence of coercion or violence that would make friend of the court ADR physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues.

(2) "Friend of the court ADR" means a process established under MCL 552.513 by which the parties are assisted to voluntarily agree to resolve a dispute concerning child custody, parenting time, or support that arises from a domestic relations matter. Friend of the court ADR includes friend of the court mediation, and may include facilitative and information-gathering conferences, joint meetings, and other friend of the court alternative dispute resolution services.

(3) "Friend of the court facilitative and information-gathering conference" is a process in which a facilitator assists the parties in reaching an agreement. If the parties fail to reach an agreement, the facilitator may prepare a report and/or recommended order.

(4) "Friend of the court domestic relations mediation" means a process in which a neutral third party facilitates confidential communication between parties to explore solutions to settle custody and parenting time or support issues for friend of the court cases. Friend of the court domestic relations mediation is not governed by MCR 3.216, which relates to domestic relations mediation conducted without participation or supervision of the friend of the court.

(5) "Joint meeting" means a process in which a person discusses proposed solutions with the parties to a custody or parenting time complaint or an objection to a friend of the court support recommendation.

(6) "Protected party" means a person who has a personal protection order or other protective order against another party to the case or a person who, due to the presence of coercion or violence in a relationship with another party to the case, could be physically or emotionally unsafe.

(C) Friend of the Court ADR Referral.

(1) On written stipulation of the parties, on written motion of a party, or on the court's initiative, the court may order any contested custody, parenting time, or support issue in a domestic relations case, including postjudgment matters to the friend of the court by written order.

(2) The court may, by an order or through its friend of the court ADR plan, provide that the parties are to meet with a person conducting ADR

other than friend of the court domestic relations mediation concerning custody, parenting time, and support issues, unless otherwise provided by statute or court rule.

(D) Cases Exempt From Friend of the Court ADR.

(1) Parties who are subject to a personal protection order or other protective order or who are involved in a past or present child abuse and neglect proceeding may not be referred to friend of the court ADR without a hearing to determine whether friend of the court ADR is appropriate. The court may order ADR if a protected party requests it without holding a hearing.

(2) The friend of the court may exempt cases from ADR by the friend of the court on the basis of the following:

(a) child abuse or neglect;

(b) domestic abuse, unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of the protected party and court staff;

(c) inability of one or both parties to negotiate for themselves at the ADR, unless attorneys for both parties will be present at the ADR session;

(d) reason to believe that one or both parties' health or safety would be endangered by ADR; or

(e) for other good cause shown.

(3) The friend of the court shall notify the court when a friend of the court case has been exempted from friend of the court ADR.

(4) If the friend of the court exempts a case from ADR, a party may file a motion and schedule a hearing to request the court to order friend of the court ADR.

(E) Objections to Friend of the Court ADR.

(1) A party may object to ADR under this rule. An objection must be based on one or more of the factors in subrule (D)(2), and must allege facts in support of the objection.

(2) Objection to Mediation:

(a) To object to friend of the court domestic relations mediation, a party must file a written motion to remove the case from friend of the court mediation and a notice of hearing of the motion, and serve a copy on all parties or their attorneys of record within 14 days after receiving notice of the order. The motion must be set for hearing within 14 days after it is filed, unless the hearing is adjourned by agreement of counsel or the court orders otherwise.

(b) A timely motion must be heard before the case is mediated.

(3) Objection to Friend of the Court Facilitative Information-Gathering Conference:

(a) To object to a friend of the court facilitative and information-gathering conference, a party must include the objection within the pleading or postjudgment motion initiating the action, a responsive pleading or answer, or file the objection within seven days of the date that the notice is sent to the party. All objections must be filed with the court.

(b) The objecting party must schedule the hearing, serve a copy of the objection and notice of hearing on all parties and/or attorneys of record.

(c) If a party timely objects, the friend of the court shall not hold a facilitative and information-gathering conference unless the court orders a conference after motion and hearing or the objecting party withdraws the objection.

(4) Objection to Joint Meetings:

(a) To object to a joint meeting, the party must file a written objection with the friend of the court and provide a copy to all parties and their attorneys of record before the time scheduled for the joint meeting.

(b) If a party files an objection, the friend of the court shall not hold a joint meeting unless the court orders a joint meeting following a hearing on motion of a party or the objecting party withdraws the objection.

(F) Friend of the Court Facilitative and Information-Gathering Conference Procedure.

(1) A friend of the court facilitative and information-gathering conference shall use the following procedure:

(a) The conference may not begin until a reasonable inquiry has been made as to whether either party has a history of domestic violence with the other party. A reasonable inquiry includes the use of the domestic violence screening protocol provided by the state court administrative office as directed by the Supreme Court.

(b) If domestic violence is identified or suspected, the conference may not proceed unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of court staff and the protected party. Throughout the facilitative and information-gathering conference process, the facilitator must make reasonable efforts to screen domestic violence that would make the conference physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues.

(c) At the beginning of the conference, the facilitator will advise the parties and their attorneys, if applicable, of the following:

(i) the purpose of the conference and how the facilitator will conduct the conference and submit an order or recommendation to the court under (F)(2)(a);

(ii) how information gathered during the conference will be used;

(iii) that statements made during the conference are not confidential and can be used in other court proceedings;

(iv) that the parties are expected to provide information as required by MCL 552.603 to the friend of the court and the consequences of not doing so.

(2) If the parties resolve all contested issues, the facilitator shall submit a report to the court as provided in subrule (I) and may provide a proposed order to the court setting forth the parties' agreements.

(a) If the parties do not resolve all contested issues at the conference or the parties agree to resolve all or some contested issues but do not sign the proposed order, the facilitator shall submit a report as provided in subrule (I) and may do one of the following:

(i) Prepare and forward a recommended order to the court within seven days from the date of the conference. The court may enter the recommended order if it approves the order and must serve it on all parties and attorneys of record within seven days after from the date the court enters the order. Accompanying the order must be a notice that a party may object to the order by filing a written objection to the court within 21 days after the date of service, and by scheduling a hearing on the objection. If there is a timely objection, the hearing must be held within 21 days after the objection is filed. If a party objects, the order remains in effect pending a hearing on a party's objection unless the court orders otherwise.

(ii) Prepare and serve a recommended order on the parties within seven days from the date of the conference along with a notice that the recommended order will be presented to the court for entry unless a party objects by filing a written objection within 21 days after the date of service, and by scheduling a hearing on the objection. If neither party files a timely objection, the court may enter the order if it approves.

(iii) Submit a recommendation to the court for further action the court might take to help the parties resolve the remaining contested issues in the case, or alert the court there are contested issues that might require the court's immediate attention.

(b) A party may consent to entry of a recommended order by signing a copy of the order at the time of the conference or after receiving the recommended order. A party who consents to entry of the order waives the right to object to the order and must file a motion to set the order aside once it enters.

(c) Except for communications made during domestic violence screening under subrule (A)(1), (F)(1)(a), and (H)(1)(a), communications made during a friend of the court facilitative and information-gathering conference are not confidential and may be used in court proceedings.

(G) Friend of the Court Domestic Relations Mediation Procedure.

(1) Domestic relations mediation will be conducted by a mediator selected by the friend of the court.

(a) The mediation may not begin until a reasonable inquiry has been made as to whether either party has a history of a coercive or violent relationship with the other party. A reasonable inquiry includes the use of the domestic violence screening protocol provided by the state court administrative office as directed by the Supreme Court.

(b) If domestic violence is identified or suspected, the mediation process may not continue unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of the protected party and court staff. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues.

(c) At the beginning of the mediation, the mediator will advise the parties and their attorneys, if applicable, of the following:

(i) the purpose of mediation;

(ii) how the mediator will conduct mediation;

(iii) except as provided for in MCR 2.412(D)(8), statements made during the mediation process are confidential and cannot be used in court proceedings.

(d) If the parties reach an agreement, the mediator shall submit a proposed order and a report pursuant to subrule (I) within seven days.

(e) If the parties do not reach an agreement within seven days of the completion of mediation, the mediator shall so advise the court stating only the date of completion of the process, who participated in the mediation, whether settlement was reached, and whether additional friend of the court ADR proceedings are contemplated.

(2) With the exceptions provided for in MCR 2.412(D), communications during friend of the court domestic relations mediation process are confidential and cannot be used in court proceedings.

(H) Joint Meeting Procedure.

(1) Joint meetings shall be conducted as provided in this subrule:

(a) The joint meeting may not begin until a reasonable inquiry has been made as to whether either party has a history of a coercive or violent relationship with the other party. A reasonable inquiry includes the use of the domestic violence screening protocol provided by the as directed by the Supreme Court.

(b) If domestic violence is identified or suspected, the meeting may not proceed unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of the protected party and court staff. Throughout the joint meeting, the person conducting the joint meeting must make reasonable efforts to screen for the presence of coercion or violence that would make the joint meeting physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues.

(c) At the beginning of a joint meeting, the person conducting the meeting shall do the following:

(i) advise the parties that statements made during the joint meeting are not confidential and can be used in other court proceedings;

(ii) advise the parties that the purpose of the meeting is for the parties to reach an accommodation and how the person will conduct the meeting;

(iii) advise the parties that the person may recommend an order to the court to resolve the dispute; and

(iv) explain to the parties the information provided for in subrules (H)(1)(d)-(e).

(d) At the conclusion of a joint meeting, the person conducting the meeting shall submit a report within seven days pursuant to subrule (I) and may do one of the following:

(i) If the parties reach an accommodation, record the accommodation in writing and provide a copy to the parties and attorneys of record. If the accommodation modifies an order, the person must submit a proposed order to the court. If the court approves the order, the court shall enter it; or

(ii) Submit an order to the court stating the person's recommendation for resolving the dispute. The parties may consent by signing the recommended order and waiving the objection period in accordance with H(1)(e)(iii). If the court approves the order, the court shall enter it.

(e) If the person conducting the joint meeting submits a recommended order within seven days to the court, the friend of the court must serve the parties and attorneys of record a copy of the order and a notice that provides the following information:

(i) that the court may enter the recommended order resolving the dispute unless a party objects to the order within 21 days after the notice is sent;

(ii) when and where a written objection must be submitted;

(iii) that a party may waive the 21-day objection period by returning a signed copy of the recommended order; and

(iv) if a party files a written objection within the 21-day limit, the friend of the court office shall set a court hearing before a judge or referee to resolve the dispute. If a party fails to file a written objection within the 21-day limit, the office shall submit the proposed order to the court for entry if the court approves it.

(2) Except for communications made during domestic violence screening, communications made during a joint meeting are not confidential and may be used in other court proceedings.

(I) The SCAO shall develop forms for reports and orders that the friend of the court shall use in the ADR processes under this court rule.

(1) A report form for a proposed consent order shall contain sufficient information to allow the court to make an independent determination that the proposed order is in the child's best interest.

(2) When the parties do not resolve some or all of the issues in a facilitative and information-gathering conference or when the friend of the court submits a proposed order following a joint meeting, the report shall contain the parties' agreed-upon and disputed facts and issues.

(3) A report under this subrule is not a friend of the court report entitled to consideration under MRE 1101(b)(9). In any contested hearing, the court may use the report to:

(a) decide the contested matter to the extent the parties do not dispute the issues or facts in the report or to the extent that the contested issues and facts are not material to the court's decision; or

(b) if the parties dispute any issues or facts in the report, the court must make an independent determination based on evidence and testimony presented at the hearing or a subsequent hearing.

(4) The court may, on its own motion, order the friend of the court to conduct an investigation and provide a report under MCL 552.505(1)(G).

(J) Qualification of ADR Providers.

(1) The SCAO shall establish training and qualification requirements for persons conducting each type of ADR under this court rule.

(2) The SCAO shall also provide a process for waiving training and qualification requirements when:

(a) the trial court demonstrates a person who meets the requirements is not reasonably available and the court's proposed candidate has suitable qualifications equivalent to those established by the SCAO; or

(b) the person will complete the requirements within a reasonable time determined by the SCAO.

Staff Comment: This proposal was developed by a workgroup facilitated by SCAO's Friend of the Court division to make more uniform the ADR processes used by Friend of the Court offices.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-13. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered January 23, 2019:

SPECIAL ADMINISTRATIVE INQUIRY REGARDING QUESTIONS RELATING TO MENTAL HEALTH ON THE MICHIGAN BAR EXAMINATION APPLICATION.

On order of the Court, this is to advise that the Court is considering whether questions regarding mental health should be included on the personal affidavit that is part of the application for the Michigan Bar Examination, and if so, what form those questions should take. Before making a final decision on this question, this notice is given to afford interested persons the opportunity to comment generally on the issue or to suggest specific language for the Court's consideration. The Court welcomes the views of all. This matter will be considered at a public hearing following the close of the public comment period. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

The Court's solicitation for public comment in this matter does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of any particular action.

The Issue

Pursuant to MCL 600.934, "[a] person is qualified for admission to the bar of this state who proves to the satisfaction of the board of law examiners that he or she is a person of good moral character, is 18 years

of age or older, has the required general education, learning in the law, and fitness and ability to enable him or her to practice law in the courts of record of this state, and that he or she intends in good faith to practice or teach law in this state." The Board of Law Examiners establishes the policies and procedures for admission to the State Bar of Michigan. In addition to passage of the Michigan Bar Examination, an applicant must be recommended for admission on the basis of the applicant's background, which process is conducted by the State Bar of Michigan through its Character and Fitness investigation procedure.

As part of the bar application process, an applicant must submit an affidavit that provides information about the applicant's life prior to taking the bar examination, including information about the applicant's mental health and treatment history. Question 54a asks:

> Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life? If yes, provide the names and addresses of all involved agencies, institutions, physicians or psychologists or other health care providers and describe the underlying circumstances or the diagnosis, treatment or hospitalization.

Further, question 54b states:

> Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?

In addition, the BLE recently added some clarifying language as a preamble to these questions as follows:

> Pursuant to MCL 600.934(1), "A person is qualified for admission to the bar of this state who proves to the satisfaction of the board of law examiners that he or she is a person of good moral character, is 18 years of age or older, has the required general education, learning in the law, and fitness and ability to enable him or her to practice law in the courts of record of this state . . ." The Michigan Board of Law Examiners (Board), as part of its responsibility to protect the public, must assess whether an applicant manifests any mental health or substance abuse issue which impairs or could impair an applicant's ability to meet the essential eligibility requirements to practice law. The Board does not seek medical records as part of this initial application. If it is later determined that medical records are required to assist in any admission decisions, they will be subsequently requested.

> This information is treated confidentially under State Bar Rule 15(7) and Board of Law Examiners Rule 2.
>
> The Board supports applicants seeking mental health and/or substance abuse treatment, and views effective treatment by a licensed professional as enhancing an applicant's ability to meet the essential eligibility requirements.
>
> In answering the questions below, you do not need to provide information that is reasonably characterized as situational counseling. Examples of situational counseling include stress counseling, grief counseling, and domestic relations counseling.

The Court is considering whether these questions should continue to be included on the affidavit, and if so, whether they should be revised.

This issue has been considered in the context of the Americans with Disabilities Act, 42 USC 12101 *et seq*., by the United States Department of Justice Civil Rights Division. In response to a complaint filed on behalf of a bar applicant in Louisiana (which contracted with the National Conference of Bar Examiners to conduct a preliminary investigation and produce a report for each applicant), the DOJ conducted an investigation into the bar application process in that state, focusing on several specific instances in which some individuals with certain diagnoses (but without evidence of conduct that required continued monitoring) were required to agree to terms of conditional admission for five years.[1] The DOJ concluded that Louisiana should modify its application to focus on an applicant's conduct, not diagnoses or treatment for such diagnoses [https://www.ada.gov/louisana-bar-lof.pdf].

As a result of the DOJ report, the NCBE revised its standard questions related to mental health to focus on the applicant's conduct. The NCBE form, used by nearly half of the states, now inquires:

> 25. Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?
>
> 26(A). Do you currently have any condition or impairment (including, but not limited to, substance abuse, or a mental emotional, or nervous condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?
>
> 26(B). If your answer to Question 26(A) is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?

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[1] Conditional admission typically requires appointment of an attorney practice monitor, mandatory consultation with the mental health care provider at least every three months, mandatory health status updates from the mental health care provider, agreement to participate in and pay for consultations with an independent medical professional, and full access to the applicant's medical records.

Further, some states that do not use the NCBE form have revised their questions to focus on conduct as opposed to diagnoses. And some states have eliminated the questions about mental health altogether, including Alaska, Arizona, California, Illinois, Maine, Massachusetts, New Mexico, Pennsylvania, and Tennessee.[2] The court seeks input on whether Michigan should continue to ask about an applicant's mental health history, or ask different questions related to this topic.

Please submit any written materials to the Office of the Administrative Counsel by May 1, 2019, and reference ADM File No. 2016-46. This issue also will be considered at a public hearing, which notice will be posted and circulated at least four weeks before the hearing. You may submit comments or materials electronically to ADMcomment@courts.mi.gov or by regular mail at 925 W. Ottawa St., Lansing, Michigan, 48915.

BERNSTEIN, J. (*concurring*). I strongly support this Court's invitation for public comment on this issue. Whether questions inquiring into an applicant's mental health should be included on the application for the Michigan Bar Examination is a significant question that not only affects law school graduates aspiring to enter the legal profession, but also one that asks us to fundamentally examine the consideration and accommodations our state is providing to those with disabilities.[1] I hope that public comment will, at a minimum, address and clarify the following questions:

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[2] In some cases, the state eliminated the specific mental health question and replaced it with a more general inquiry, such as "Is there any other information, incident(s), or occurrence(s) which . . . may have a bearing, either directly or indirectly, positively or negatively, upon your ability to practice law actively and continuously?" (Arizona) and "Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?" (Alaska).

[1] Federal courts have consistently held that Title II of the Americans with Disabilities Act, 42 USC 12131 *et seq*., applies to state bar associations and that bar applicants with a history of mental health diagnosis or treatment are "qualified individual[s] with a disability" under 42 USC 12132. See, e.g., *ACLU of Ind v Ind State Bd of Law Examiners*, unpublished opinion of the United States District Court for the Southern District of Indiana, issued September 20, 2011 (Case No. 1:09-cv-842-TWP-MJD), pp 9-10; *Ellen S v Fla Bd of Bar Examiners*, 859 F Supp 1489, 1491-1493 (SD Fla, 1994). Further, federal regulations prohibit eligibility criteria "that screen out or tend to screen out an individual with a disability . . . unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered," 28 CFR 35.130(b)(8) (2018), and prohibit "policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others," 28 CFR 35, Appendix B.

(1) How, if at all, is inquiring into the state of an applicant's mental health an effective or appropriate way of assessing an applicant's "good moral character"? See MCL 600.934(1).

(2) How, if at all, is inquiring into an applicant's mental health status an effective way of assessing an applicant's "fitness and ability" to practice law? See MCL 600.934(1).

To provide greater context for this question, in its investigation into the Louisiana bar application, the United States Department of Justice (DOJ) cited substantial research indicating that "a history of mental health diagnosis or treatment does not provide an accurate basis for predicting" future professional misconduct. United States Department of Justice, *The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (ADA)*, DJ No. 204-32M-60, 204-32-88, 204-32-89 (*DOJ Investigation*), p 5, available at (accessed January 15, 2019) [https://perma.cc/5WAP-UK6F].[2] Similarly, in *In re Petition & Questionnaire for Admission to the RI Bar (Rhode Island)*, 683 A2d 1333, 1336 (RI, 1996), the Rhode Island Supreme Court, after receiving extensive public input, found: "Research has failed to establish that a history of previous psychiatric treatment can be correlated with an individual's capacity to function effectively in the workplace," and that "there is no empirical evidence demonstrating that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action by the bar or by any other regulatory body in comparison with those who have not had such treatment."[3] In our consideration of this issue, evidence that bears on

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[2] The *DOJ Investigation* cited various authorities to substantiate this point. E.g., *DOJ Investigation* at 23, quoting American Bar Association Commission on Mental and Physical Disability Law, *Recommendation to the House of Delegates*, 22 Mental & Physical Disability L Rep 266, 267 (1998) (" 'Research in the health field and clinical experience demonstrate that neither diagnosis nor the fact of having undergone treatment support any inferences about a person's ability to carry out professional responsibilities or to act with integrity, competence, or honor.' "); *DOJ Investigation* at 23, quoting Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L Rev 93, 141 (2001) (" '[T]here is simply no empirical evidence that applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney[.]' "); *DOJ Investigation* at 23, quoting Bauer, 49 UCLA L Rev at 141-142 n 153 ("observing that the only small retrospective study of attorneys 'provides no support at all for the notion that individuals with mental health treatment histories are more likely than others to engage in misconduct as attorneys' ").

[3] See also *Clark v Va Bd of Bar Examiners*, 880 F Supp 430, 436, 446 (ED Va, 1995) (finding that expert testimony failed to show either "a correlation between mental health questions and an inability to practice

the connection, or lack thereof, between a person's mental health status and his or her ability to practice law would be invaluable.

(3) What standards or guidelines are used in: (a) evaluating an applicant's initial answers to the mental health questions on the bar application, (b) regulating any subsequent investigation into an applicant's mental health history, and (c) determining whether an applicant's mental health history should preclude his or her acceptance into the bar?

(4) Does asking mental health questions actually deter prospective applicants, such as law students, from seeking rehabilitative counseling and treatment, or detract from the effectiveness of such professional help?

In its aforementioned investigation, the DOJ cited evidence that confidentiality is a critical element of the treatment relationship and that fears of disclosure could discourage individuals from seeking professional help. *DOJ Investigation* at 23.[4] In *Rhode Island*, the court noted that, in the substance abuse context, a significant portion of surveyed law students indicated that "if they suffered from a substance-abuse problem, they would seek assistance . . . if they were assured that bar officials would not have access to the information." *Rhode Island*, 683 A2d at 1336, citing Association of American Law Schools, *Report of*

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law," or that obtaining evidence of mental health counseling or treatment is effective in guarding against a threat to public safety).

[4] The *DOJ Investigation* cited various authorities to substantiate this point. E.g., *Jaffee v Redmond*, 518 US 1, 10-11 & n 10 (1996) (recognizing a federal psychotherapist-patient privilege based on the view that confidentiality of psychotherapy sessions is crucial to their success and serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem); United States Department of Health & Human Services, *Mental Health: A Report of the Surgeon General*, p 441 (1999) (observing that "evidence also indicates that people may become less willing to make disclosures during treatment if they know that information will be disseminated beyond the treatment relationship"); American Psychiatric Association, *Resource Document on Recommended Guidelines Concerning Disclosure and Confidentiality* (1999), p 1, available at <https://www.psychiatry.org/psychiatrists/search-directories-databases/library-and-archive/resource-documents> (accessed January 15, 2019) (finding that disclosure policies "inhibit individuals who are in need of treatment from seeking help"); Association of American Law Schools, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J Legal Educ 35, 54-55 (1994) (finding that a much higher percentage of law students would seek treatment for substance abuse problems or refer others to treatment if they were assured that bar officials would not have access to that information); *Bauer*, p 150 (describing how disability-related questions can discourage applicants from obtaining treatment and undermine its effectiveness).

the AALS Special Committee on Problems of Substance Abuse in the Law Schools, 44 J Legal Educ 35, 55 (1994). This response led the court to conclude that mental health questions could unwittingly dissuade a person in need of treatment from seeking assistance. *Id*. I welcome input on whether requiring disclosure of one's mental health status actually discourages individuals from seeking helpful treatment, or possibly reduces the effectiveness of any treatment sought.

(5) What purpose is served by asking mental health questions that is not already served by other questions asked on the bar application?

In addition to an applicant's mental health status, the bar application probes into many other areas of a person's life, including his or her criminal history, employment background, academic record, professional licensures, financial history, involvement in civil litigation, and residential past. In many of these areas, an applicant is required to disclose instances of misconduct, disciplinary action, termination, or other adverse actions taken against the applicant. Are these questions and answers sufficient to assess an applicant's fitness and ability to practice law? Said differently, what do mental health questions add to the bar application that is not already covered in this already intensive inquiry?

(6) Multiple states have entirely eliminated mental health questions from their bar applications (Alaska, Arizona, California, Illinois, Maine, Massachusetts, New Mexico, Pennsylvania, and Tennessee). What effect, if any, has eliminating these questions had on the effective functioning of the legal systems in these states? In other words, have the legal systems in these states been negatively affected in any way by eliminating such questions?

(7) Does answering affirmatively to the mental health questions impose any additional burdens on an applicant, or cause delays in the processing of an applicant's application? Do these burdens or delays occur even if the applicant is ultimately admitted to the bar?[5]

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[5] Here, I note that several courts have found that mental health questions impose additional and discriminatory burdens on applicants with disabilities. See, e.g., *Clark*, 880 F Supp at 442 ("Unlike other applicants, those with mental disabilities are required to subject themselves to further inquiry and scrutiny. The Court finds that this additional burden discriminates against those with mental disabilities."); *Ellen*, 859 F Supp at 1494 (finding that Florida's mental health questions "discriminate against Plaintiffs by subjecting them to additional burdens based on their disability"); *Med Society of NJ v Jacobs*, unpublished opinion of the United States District Court of New Jersey, issued October 5, 1993 (Case No. 93-3670-WGB) (concluding that mental health questions imposed extra burdens on qualified persons with disabilities in violation of the ADA); *In re Applications of Underwood and Plano*, unpublished opinion of the Maine Supreme Judicial Court, issued December 7, 1993 (Case No. BAR-93-21) (finding that requiring applicants to answer mental health questions discriminates

Order Entered February 13, 2019:

PROPOSED AMENDMENT OF MCR 7.312.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.312 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.312. BRIEFS AND APPENDIXES IN CALENDAR CASES AND CASES ARGUED ON THE APPLICATION.

(A) Form and Length. Briefs in calendar cases and cases to be argued on the application must be prepared in conformity with MCR 7.212(B), (C), (D), and (G) as to form and length. If filed in hard copy, ~~B~~briefs shall be printed on only the front side of the page of good quality, white unglazed paper by any printing, duplicating, or copying process that provides a clear image. Typewritten, handwritten, or carbon copy pages may be used so long as the printing is legible.

(B)-(C) [Unchanged.]

(D) Appendixes.

(1) Form. Appendixes must be prepared in conformity with MCR 7.212(B), and shall be similarly endorsed as briefs under MCR 7.312(C) but designated as an appendix (e.g., "Appellant's Appendix," "Appellee Appendix," "Joint Appendix"). If submitted in hard copy, ~~A~~appendixes must be printed on both sides of the page and, if they encompass more than 20 sheets of paper, must also be submitted on electronic storage media in a file format that can be opened, read, and printed by the Court.

(2) Appellant's Appendix. The appellant must file ~~A~~an appendix in calendar cases and in cases to be argued on the application. The appendix ~~filed by the appellant must be entitled "Appellant's Appendix,"~~ must be separately bound~~,~~ and numbered separately from the brief with the letter "a" following each page number (e.g., 1a, 2a, 3a). Each page of the appendix must include a header that briefly describes the character of the document, such as the names of witnesses for testimonial evidence or the nature of the documents for record evidence. The

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on the basis of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities).

appendix must include a table of contents and, when applicable, must contain:

(a)-(e) [Unchanged.]

The items listed in subrules (D)(2)(a) to (e) must be presented in chronological order.

(3) Joint Appendix.

(a) The parties may stipulate to use a joint appendix~~, so designated,~~ containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrule (D)(2) and shall be separately bound and served with the appellant's brief.

(b) [Unchanged.]

(4) Appellee's Appendix. ~~An appendix, entitled "Appellee's Appendix," may be filed.~~ The appellee's appendix, if any, must comply with the provisions of subrule (D)(2) and be numbered separately from the brief with the letter "b" following each page number (e.g., 1b, 2b, 3b). Materials included in the appellant's appendix or joint appendix may not be repeated in the appellee's appendix, except to clarify the subject matter involved.

(E) Time for Filing. Unless the Court directs a different time for filing,

(1) the appellant's brief and appendixes, if any, are due

(a) within 56 days ~~after~~of the order granting the application for leave to appeal ~~is granted~~;, or

(b) within 42 days of the order directing the clerk to schedule oral argument on the application;

(2) the appellee's brief and appendixes, if any, are due

(a) within 35 days after the appellant's brief is served on the appellee in a calendar case, or

(b) within 21 days after the appellant's brief is served on the appellee in a case being argued on the application; and

(3) the reply brief is due

(a) within 21 days after the appellee's brief is served on the appellant in a calendar case, or

(b) within 14 days after the appellee's brief is served on the appellant in a case being argued on the application.

(F) [Unchanged.]

(G) Cross-Appeal Briefs. The filing and service of cross-appeal briefs are governed by subrule (F). An appellee/cross-appellant may file a combined brief for the primary appeal and the cross-appeal within 35 days after service of the appellant's brief in the primary appeal for both calendar cases and cases being argued on the application. An appellant/cross-appellee may file a combined reply brief for the primary appeal and a responsive brief for the cross-appeal within 35 days after service of the cross-appellant's brief for both calendar cases and cases being argued on the application. A reply to the cross-appeal may be filed within 21 days after service of the responsive brief in a calendar case and within 14 days after service of the responsive brief in a case being argued on the application.

(H) Amicus Curiae Briefs and Argument.

(1) An amicus curiae brief may be filed only on motion granted by the Court except as provided in subsection (2) or as directed by the Court.

(2) [Unchanged.]

(3) An amicus curiae brief must conform to subrules (A), (B), (C) and (F), and.

(4) Unless the Court directs a different time for filing, an amicus brief must be filed

(a) within 21 days after the brief of the appellee has been filed or the time for filing such brief has expired in a calendar case, or

(b) within 14 days after the brief of the appellee has been filed or the time for filing such brief has expired in a case being argued on the application, ~~or at any other time the Court directs~~.

(~~4~~5) An amicus curiae may not participate in oral argument except by Court order.

(I)-(J) [Unchanged.]

(K) For cases argued on the application, parties should focus their argument on the merits of the case, and not just on whether the Court should grant leave.

Staff Comment: The proposed amendment of MCR 7.312 would incorporate into the Supreme Court rules the procedure to be followed for cases being argued on the application. These rules have been previously included in orders granting argument on the application. A proposed new subrule (K) would alert parties to the fact that they should argue the merits of the case even for motions being heard on the application.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-25. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

VIVIANO, J. (*concurring*). I concur in the Court's order publishing for comment proposed changes to MCR 7.312 that are designed to standardize and make uniform the filing procedures for cases argued on the application (commonly referred to as "MOAAs," an acronym derived from "mini oral arguments on the application"). I write separately because this seems an opportune time to also consider whether MOAAs are serving their intended purpose—or any purpose—well or whether it is time to consider ending the practice altogether.

The MOAA procedure was created in 2003 in an amendment to MCR 7.302 (now MCR 7.305).[1] According to a statement signed by the four justices who voted in support of the amendment, the purpose of the amendment was "to afford something beyond summary review to more cases being appealed to this Court."[2] The statement asserted that allowing oral argument on the application would "not come at the expense of fuller oral argument, but as an alternative to no oral argument at all."[3] In recent years, while the number of MOAAs has increased, the number of cases in which the Court has granted leave to appeal has decreased significantly.[4] Therefore, it appears that MOAAs may no longer be serving their intended purpose.

Rather than functioning to allow substantive consideration and resolution of more cases, it appears that MOAAs primarily serve two purposes. First, MOAAs give us the option of hearing a case but limiting oral argument to 15 minutes per side, as opposed to the traditional 30 minutes per side in cases where leave to appeal is granted.[5] Second, they give the Court the option of disposing of a case after arguments without a decision on the merits by simply denying leave, instead of our traditional practice following a grant of leave to appeal, i.e., entry of an order vacating the grant order and denying leave (thereby implicitly recognizing that leave was improvidently granted).[6]

Beyond the question of whether the MOAA is serving the purpose intended by the Court at the time of its adoption, it appears that MOAAs have also become a source of frustration and confusion to the appellate bar.[7] The members of this Court frequently field questions about MOAAs—why we do them, how they are different from grants, how

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[1] See MCR 7.302, 469 Mich cxlv. The amendment added the following underlined language to MCR 7.302(G)(1):

> The Court may grant or deny the application, enter a final decision, or issue a peremptory order. There is no oral argument <u>on applications unless ordered by the Court</u>. The clerk shall issue the order entered and mail copies to the parties and to the Court of Appeals clerk.

[2] MCR 7.302, 469 Mich cxlvi (MARKMAN, J., concurring).

[3] *Id*.

[4] In the past six terms, our Court has ordered 20, 16, 23, 36, 41, and 53 MOAAs, respectively. By contrast, we have ordered 45, 46, 26, 27, 17, and 17 grants, respectively.

[5] See MCR 7.314(B).

[6] This appears to be happening with increasing frequency—by one account, the Court has issued denials in 50 of the 150 MOAAs it has considered during the past five terms.

[7] In fact, the 2019 Michigan Appellate Bench Bar Conference is scheduled to include two breakout sessions entitled "Michigan Supreme Court Mini-Oral Arguments (MOAs)—How Are They Working?" Michi-

arguments should be presented, etc. Parties have also expressed confusion over the fact that MOAAs are nominally intended to address "whether to grant leave to appeal," when in reality our Court will regularly decide a case on the merits following a MOAA. Some practitioners have argued that MOAAs are ill-suited to decide significant issues because the truncated briefing schedule does not allow time for full-merits briefing and amicus involvement. And MOAAs certainly present a unique challenge to the advocates, who must argue in a compressed time frame both why the case is jurisprudentially significant (such that we should not simply deny leave) and why the issue presented should be resolved in their client's favor.

The proposed changes are intended to address some of these concerns. However, in contemplating whether to adopt them, I believe we should also consider the broader question of whether the MOAA procedure should be preserved and improved, or whether it no longer serves its intended purpose and the practice should be ended.

Order Entered February 27, 2019:

PROPOSED AMENDMENT OF MCR 1.109.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 1.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1)-(2) [Unchanged.]

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gan Appellate Bench Bar Conference Foundation, *Michigan Appellate Bench Bar Conference*, available at https://benchbar.org/wp-content/uploads/2019/01/MABBCF-Brochure-1-22-19-2.pdf> (accessed February 6, 2019), pp 4, 6 [https://perma.cc/7K5A-YVW8]. According to the event brochure, the session will include "a candid discussion of the costs and benefits derived from the increased use of MOAs in recent years." *Id*.

(3) Scope and Applicability.

(a)-(f) [Unchanged.]

(g) Where electronic filing is mandated, a party may file paper documents with that court and be served with paper documents according to subrule (G)(6)(a)(ii) if the party can demonstrate good cause for an exemption. A party who is confined by governmental authority, including but not limited to an individual who is incarcerated in a jail or prison facility, detained in a juvenile facility, or committed to a medical or mental health facility, has good cause for an exemption.

(i) A request for an exemption must be filed with the court where the individual's case will be or has been filed. The request must be on a form approved by the State Court Administrative Office and verified under MCR 1.109(D)(3). There is no fee for the request.

(ii) The request must specify the reasons that prevent the individual from filing electronically. The individual may file supporting documents along with the request for the court's consideration.

(iii) A judge must review the request and any supporting documentation and issue an order granting or denying the request within two business days of the date the request was filed.

(iv) The clerk of the court must promptly mail the order to the individual. The clerk must place the request, any supporting documentation, and the order in the case file. If there is no case file, the documents must be maintained in a group file.

(v) An exemption granted under this rule is valid only for the court in which it was filed and for the life of the case unless the individual exempted from filing electronically registers with the electronic-filing system. In that event, the individual waives the exemption and becomes subject to the rules of electronic filing and the requirements of the electronic-filing system. An individual who waives an exemption under this rule may file another request for exemption.

(4)-(7) [Unchanged.]

Staff Comment: The proposed amendment of Rule 1.109 of the Michigan Court Rules is an expected progression necessary for design and implementation of the statewide electronic-filing system. This particular amendment will assist in implementing the goals of the project.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by

this proposal at [http://courts.mi.gov/courts/michigansupremecourt/michigansupremecourt/rules/court-rules-admin-matters/pages/default/.aspx].

Order Entered February 27, 2019:

PROPOSED ADMINISTRATIVE ORDER TO REQUIRE E-FILING ACCESS PLANS.

Administrative Order No. 2019-XX — Trial Court Requirements for Providing Meaningful Access to the Court for Mandated Electronic Filers.

To ensure that those individuals required to electronically file court documents have meaningful access to Michigan courts, the Michigan Supreme Court adopts this order requiring courts that seek permission to mandate that all litigants e-File to first submit an e-Filing Access Plan for approval by the State Court Administrative Office.

Each plan must conform to the model promulgated by the state court administrator and ensure access to at least one computer workstation per county. The plan shall be submitted to and approved by the State Court Administrative Office as a local administrative order under MCR 8.112. The State Court Administrative Office may revoke approval of an e-Filing Access Plan due to litigant grievances.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

APPENDIX

State Court Administrative Office
Model Local Administrative Order XX – e-Filing Access Plan

[LOCAL COURT LETTERHEAD]

Administrative Order [year] – [number]

E-FILING ACCESS PLAN

This e-Filing access plan is intended to ensure meaningful access to court services for litigants who are unable to remotely file court documents electronically when a court seeks to mandate electronic filing for all filers. The purpose of this plan is to ensure that a court can show it will provide sufficient assistance to litigants. This plan is based on the premise that the majority of filers that need assistance with access to

electronic filing are self-represented litigants. This plan does not address the needs of litigants deemed exempt from e-filing.

IT IS ORDERED:

Section I. Needs Assessment

A. Self-Represented Litigant Data

The court will provide self-represented litigants service and access to e-Filing computer workstations to electronically file documents in the court. The court has used the e-Filing Workstation Calculator available at [link] to estimate the number of workstations necessary to support the number of self-represented litigants who may come to the courthouse to file. The court's completed calculator is attached as Addendum 1.

B. Government Agencies

The court has identified that the following government agencies routinely file documents with the court: [*List government agencies such as law enforcement, Michigan Department of Health and Human Services, Michigan Department of Corrections, etc.*]. The court has consulted with each government agency listed above and established that it is capable of e-filing court documents. Additionally, the court has consulted with law enforcement agencies specifically regarding e-filing citations.

- The following law enforcement agency(ies) are exempt from e-filing citations [*Name the specific law enforcement agency(ies) that are exempt from e-filing. If no law enforcement agencies are exempt, delete this section.*]:
  -

Section II. e-Filing Assistance Resources

A. Access to Computer Workstations

No less than [***Insert number or workstations identified by calculator available at this [link]. If the calculator returns an estimate of zero computer workstations, the court must identify computer workstations that self-represented litigants may be referred to below and may delete this sentence.***] computer workstations will be available to litigants for the purposes of e-filing court documents. Where possible, computer workstations will be located in the courthouse. Computer workstations are available in the following locations. [***List and describe all available computer workstations that self-represented litigants may use to electronically file court documents, including courthouse workstations specifically for that purpose, court clerk workstations that can be made available as necessary, self-help centers in the courthouse or county, and entities with which the court has a memorandum of understanding, such as libraries, universities, senior centers, community centers, etc. If entities with which the court has a memorandum of understanding are included, a copy of the executed memorandum of***

understanding must be attached. At least one computer workstation per county must be identified. Multi-county jurisdictions must have more than one computer workstation per jurisdiction. The court may include other resources not listed here.].

1.

2.

3.

4.

Computer workstations will meet or exceed the capabilities of the configurations recommended on the MiFILE webpage available at http://www.mifile.info/mifile-pricing/.

B. Access to Assistance in e-Filing Documents

The court will assist individuals who need help electronically filing documents in the following ways.

- Assistance with using the court's electronic equipment such as computers, scanners, and printers includes: [***List and describe the written materials, tutorial videos, clerk assistance, etc. that the court provides to assist litigants with using or troubleshooting the technology necessary to e-file.***].
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- Assistance for completing e-Filing tasks includes: [***List and describe the written materials, tutorial videos, clerk assistance, etc. available to assist self-represented litigants in using the MiFILE program interface.***].
  - ImageSoft Inc. MiFILE Customer Care at 855-959-8868.
  - THIS IS A PLACEHOLDER FOR MiFILE TRAINING VIDEO LOCATION
  - Electronic mail address Support@TrueFiling.com
  -
  -

Section III. Training

The court is committed to training its court staff to provide meaningful access to the court. When the court provides training, it will include a component on ensuring self-represented litigants have access to e-Filing resources. The court will work with the State Court Administrative Office (SCAO) and Michigan Judicial Institute to ensure that all employees are trained on e-Filing access policy and process.

Section IV. Public Notification and Evaluation of e-Filing Access Plan

A. e-Filing Access Plan Approval and Notification

This e-Filing Access Plan has been approved by the State Court Administrative Office. The court will post its e-Filing Access Plan on its public website (if available) or public notification area within the courthouse and will make copies of the plan available upon request.

B. Evaluation and Review of the e-Filing Access Plan

One year after the effective date of this local administrative order and every three years thereafter, the court will assess whether its e-Filing Access Plan needs to be updated. Review of the following areas may indicate a need to update the e-Filing Access Plan:

- Number of litigants requesting access to computer workstations
- Number of litigants requesting assistance using computer workstations
- Number of litigants requesting procedural assistance electronically filing documents in the court
- Changes in the entities with which the court has a Memorandum of Understanding for the purposes of e-Filing
- Changes in the Memorandum of Understanding for the entity with which the court has a relationship to assist with e-filing
- Feedback from litigants
- Feedback from court staff
- Changes to the e-Filing initiative statewide or locally
- Problems that have arisen since implementation of the above plan

C. Grievance Process

The court is committed to addressing grievances regarding access to electronic filing assistance promptly and thoroughly.

Specific issues regarding e-Filing access must be submitted to the chief judge, court administrator, and State Court Administrative Office by completing form SCAO XX. The court will respond in writing to your grievance using SCAO XXb within five business days.

Effective Date:

Date:_____ Chief Judge Signature: _____

Order Entered March 20, 2019:

PROPOSED RESCISSION OF MCR 8.123.

On order of the Court, this is to advise that the Court is considering a rescission of Rule 8.123 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adop-

tion, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigan supremecourt/rules/pages/default.aspx.]

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

~~RULE 8.123. COUNSEL APPOINTMENTS; PROCEDURE AND RECORDS.~~

~~(A) Applicability. This rule applies to all trial courts, which means all circuit courts, district courts, probate courts, and municipal courts.~~

~~(B) Plan for Appointment. Each trial court must adopt a local administrative order that describes the court's procedures for selecting, appointing, and compensating counsel who represent indigent parties in that court.~~

~~(C) Approval by State Court Administrator. The trial court must submit the local administrative order to the State Court Administrator for review pursuant to MCR 8.112(B)(3). The State Court Administrator shall approve a plan if its provisions will protect the integrity of the judiciary.~~

~~(D) Required Records. At the end of each calendar year, a trial court must compile an annual electronic report of the total public funds paid to each attorney for appointments by that court.~~

~~This subrule applies to appointments of attorneys in any capacity, regardless of the indigency status of the represented party. Trial courts that contract for services to be provided by an affiliated group of attorneys may treat the group as a single entity when compiling the required records.~~

~~The records required by this subrule must be retained for the period specified by the State Court Administrative Office's General Schedule 16.~~

~~(E) Public Access to Records. The records must be available at the trial court for inspection by the public, without charge. The court may adopt reasonable access rules, and may charge a reasonable fee for providing copies of the records.~~

~~(F) Reports to State Court Administrator. A trial court must submit its annual electronic report to the state court administrator in the form specified by the state court administrator. When requested by the state court administrator, a trial court must cooperate in providing additional data on an individual attorney, judge, or attorney group for a period specified by the request, including the number of appointments by each judge, the number of appointments received by an individual attorney or attorney group, and the public funds paid for appointments by each judge.~~

Staff Comment: Because counsel appointment plan review and data collection regarding payments for appointed counsel is now, by statute, a requirement of the Michigan Indigent Defense Commission under MCL 780.989 and MCL 780.993, this proposed amendment would rescind MCR 8.123, which requires certain data be collected from courts and plans for appointment be approved by SCAO.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered April 3, 2019:

PROPOSED AMENDMENT OF MCR 8.110.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.110 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 8.110. CHIEF JUDGE RULE.

(A) [Unchanged.]

(B) Chief Judge, Chief Judge Pro Tempore, and Presiding Judges of Divisions.

(1) The Supreme Court shall select a judge to serve as chief judge of each trial court. When SCAO is considering recommending appointment of a chief judge of a specific group of courts, SCAO shall inform and seek input from those courts. Any judge of a court or group of courts may submit an application or recommendation to SCAO regarding the selection of a chief judge for that court or group of courts. The

application for appointment of chief judge shall be made available to all judges. The application will describe the criteria for selection of chief judge, and will include an opportunity for any judge or judges to provide information to the Court regarding the selection of a particular person as chief judge. The input submitted from judges in a court for which a chief judge is being selected shall be given respectful consideration.

(2) [Unchanged.]

(3) The chief judge, chief judge pro tempore, and any presiding judges shall serve a two-year term beginning on January 1 of each even-numbered year, provided that the chief judge serves at the pleasure of the Supreme Court and the chief judge pro tempore and any presiding judges serve at the pleasure of the chief judge. A chief judge shall attend training as required by the state court administrator.

(4) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(8) [Unchanged.]

(9) The delegation of such authority to a chief judge does not in any way limit the Supreme Court's authority to exercise "general superintending control over all courts" under Const 1963, art 6, § 4.

(D) Court Hours; Court Holidays; Judicial Absences.

(1)-(2) [Unchanged.]

(3) Judicial Vacation Standard. A judge ~~is expected to~~may take an annual vacation leave of ~~20~~30 days ~~with the approval of the chief judge to ensure docket coordination and coverage~~. ~~A judge may take an additional 10 days of annual vacation leave with the approval of the chief judge.~~ A maximum of ~~30~~15 days of annual vacation unused due to workload constraints may be carried ~~from one calendar year~~ into the ~~first quarter of the~~ next calendar year ~~and used during that quarter, if approved by the chief judge~~. Vacation days do not include:

(a) [Unchanged.]

(b) attendance~~, with the chief judge's approval,~~ at educational meetings or seminars;

(c) attendance~~, with the chief judge's approval,~~ at meetings of judicial committees or committees substantially related to judicial administration of justice;

(d)-(e) [Unchanged.]

(4) Judicial Education Leave Standard. A judge is expected to take judicial education leave of 2 weeks every 3 years to participate in continuing legal education and training at Michigan judicial training programs and nationally recognized judicial education programs, including graduate and refresher courses. Judicial education leave does not include judicial conferences for which attendance is required. The use of judicial education leave ~~approved by the chief judge~~ does not affect a judge's annual leave.

(5) Judicial Professional Leave Standard. Judges are encouraged, as part of their regular judicial responsibilities, to participate in professional meetings and conferences that advance the administration of justice or the public's understanding of the judicial system; to serve on commissions and committees of state and national organizations that

contribute to the improvement of the law or that advance the interests of the judicial system; and to serve on Supreme Court-appointed or in-house assignments or committees. The use of judicial professional leave ~~approved by the chief judge~~ does not affect a judge's annual leave or education leave.

(6) Approval of Judicial Absences. A judge may not be absent from the court without ~~the chief judge's prior approval,~~ notifying the chief judge except for personal illness. ~~In making the decision on a request to approve a vacation or other absence, the chief judge shall consider, among other factors, the pending caseload of the judge involved.~~ The chief judge ~~shall withhold approval of~~may require a judge to forego vacation, judicial education, or judicial professional leave ~~that conforms to these standards~~ only if ~~withholding approval is~~ necessary to ensure ~~the orderly conduct of judicial business~~docket coordination and coverage. The chief judge shall maintain records of absences to be available at the request of the Supreme Court.

Staff Comment: The proposed amendment of MCR 8.110 would provide additional opportunity for input by judges in the process for chief judge selection in courts, would clarify that vacation leave time may be taken by notifying the chief judge, and would make vacation leave policies more uniform from one court to another. Under the proposed amendment, a chief judge could require a judge to forego vacation, judicial, or education, or professional leave to ensure docket coordination and coverage.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-03. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

VIVIANO, J., would have declined to publish the proposal for comment.

Order Entered April 18, 2019:

PROPOSED AMENDMENT OF MCR 2.612.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.612 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be

considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.612. RELIEF FROM JUDGMENT OR ORDER.

(A)-(B) [Unchanged.]

(C) Grounds for Relief From Judgment.

(1)-(3) [Unchanged.]

(4) Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Staff Comment: The proposed amendment of MCR 2.612 would clarify that writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. This language was previously included in the court rules before they were rewritten in 1985.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-12. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered April 18, 2019:

PROPOSED RESCISSION OF ADMINISTRATIVE ORDER 1997-5 (DEFENDERS — THIRD CIRCUIT COURT).

On order of the Court, this is to advise that the Court is considering a proposed rescission of Administrative Order No. 1997-5. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be

considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

~~Administrative Order No. 1997-5 — Defenders — Third Circuit Court~~

~~The Court has determined that the efficient administration of justice requires the extension of the provisions of Administrative Order No. 1972-2 to criminal matters coming before the Third Circuit Court after the merger of the Third Circuit Court and Recorder's Court on October 1, 1997. It is therefore ordered that effective October 1, 1997, and until further order of the Court, that the Chief Judge of the Third Circuit Court shall provide for the assignment as counsel, on a weekly basis, of the Legal Aid and Defender Association in twenty-five percent of all cases wherein counsel are appointed for indigent defendants.~~

Staff comment: The proposed rescission of Administrative Order No. 1997-5 is consistent with the current practice of appointment of counsel, which is now governed by statute and regulated through the Michigan Indigent Defense Commission.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered April 22, 2019:

PROPOSED AMENDMENTS OF RULES 1.1 AND 1.6 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering amendments of Rules 1.1 and 1.6 of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices

and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.1. COMPETENCE.

[Rule unchanged.]

Comments:

Legal Knowledge and Skill. [Unchanged.]

Thoroughness and Preparation. [Unchanged.]

Maintaining Competence. To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including the knowledge and skills regarding developing technology that are reasonably necessary to provide competent representation for the client in a particular matter. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

RULE 1.6. CONFIDENTIALITY OF INFORMATION.

[Rule unchanged.]

Comments: [Current language unchanged; proposed new language would be a new comment at the end of the comments section.]

Confidentiality of Information. When transmitting a communication that contains confidential and/or privileged information relating to the representation of a client, the lawyer should take reasonable measures and act competently so that the confidential and/or privileged client information will not be revealed to unintended third parties. Such reasonable measures should reflect the lawyer's adequate knowledge and understanding of the technology used to transmit the confidential and/or privileged client information.

Staff comment: The proposed amendments of the comments of MRPC 1.1 and MRPC 1.6 address a lawyer's obligation to maintain competence in relevant technology and ensure reasonable efforts to maintain confidentiality of documents.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-11. Your

comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered April 22, 2019:

PROPOSED AMENDMENT OF MCR 3.201 AND PROPOSED ADOPTION OF MCR 3.230.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.201 and a proposed addition of Rule 3.230 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Rule 3.230 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.201. APPLICABILITY OF RULES.

(A) Subchapter 3.200 applies to

(1) actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, ~~family~~ support under MCL 552.451 *et seq*., or MCL 722.1 *et seq*., the custody of minors or parenting time under MCL 722.21 *et seq*. or MCL 722.1101 *et seq*., ~~and visitation with minors under MCL 722.27b, and to~~

(2) an expedited proceeding to determine paternity or child support under MCL 722.1491 *et seq*., or to register a foreign judgment or order under MCL 552.2101 *et seq*. or MCL 722.1101 *et seq*., and to

(~~2~~3) proceedings that are ancillary or subsequent to the actions listed in subrules (A)(1) and (A)(2) and that relate to

(a) [Unchanged.]

(b) ~~visitation~~parenting time with minors, or

(c) [Unchanged.]

(B)-(C) [Unchanged.]

(D) When used in this subchapter, unless the context otherwise indicates:

(1) "Case" means an action ~~initiated~~commenced in the family division of the circuit court by:

(a)-(c) [Unchanged.]

(d) filing a petition under MCR 3.222(C); ~~or~~

(e) filing a consent judgment under MCR 3.223~~.~~;

(f) filing of a complaint and notice under MCR 3.230; or

(g) filing a request for entry of a consent agreement and a consent judgment or order under MCR 3.230.

(2)-(3) [Unchanged.]

(4) "Initiating document" means a statement, letter, or other document filed in lieu of a complaint to open a case and request relief under the Summary Support and Paternity Act, MCL 722.1491 *et seq.*, or to register a foreign judgment or order under the Uniform Interstate Family Support Act, MCL 552.2101 *et seq.* or the Uniform Child Custody Jurisdiction Enforcement Act, MCL 722.1101 *et seq*.

RULE 3.230. ACTIONS UNDER THE SUMMARY SUPPORT AND PATERNITY ACT.

(A) Scope and Applicability of Rules; Definitions.

(1) Procedure in actions under the Summary Support and Paternity Act, MCL 722.1491 *et seq*., is governed by the rules applicable to other domestic relations actions, except as otherwise provided in this rule and the act.

(2) Definitions. For purposes of this rule

(a) "IV-D agency" means the agency in a county that provides support and paternity establishment services under MCL 722.1501.

(b) "Plaintiff" means

(i) The child's mother, father, or alleged father on whose behalf the IV-D agency files the action, or

(ii) The Michigan Department of Health and Human Services when the IV-D agency files an action on behalf of a child.

(c) "Expedited paternity action" means an action commenced to establish either paternity or paternity and support under MCL 722.1491 *et seq*.

(d) "Expedited support action" means an action commenced to establish a parent's support obligation under MCL 722.1499.

(B) Commencing an Action.

(1) A IV-D agency commences an expedited paternity or expedited support action by filing one of the following with the court:

(a) A complaint and notice, or

(b) A request to enter a consent agreement, and a consent judgment or order signed by the parties.

(2) Upon filing an action, the court clerk shall assign a case number and judge. The court clerk shall not issue a summons under MCR 2.102.

(3) A complaint, notice, and request for entry of a consent agreement used to initiate an action or set child support must be completed on forms approved by the State Court Administrative Office.

(4) Complaint to Establish Paternity. A complaint filed in an expedited paternity action shall:

(a) contain a statement of the information required in MCL 722.1495 and other applicable laws and rules,

(b) comply with the provisions of MCR 2.113 and MCR 3.206(A),

(c) state the relief being requested, and

(d) be verified and signed by the mother or alleged father, or signed by the IV-D agency. A statement signed by a IV-D agency does not need to be verified, and may be signed "on information and belief." If the plaintiff is a minor, the complaint must be signed as provided in MCR 2.201(E).

(5) Complaint to Establish Duty for Child Support. A complaint filed in an expedited support action shall:

(a) contain the information required in MCL 722.1499, and other applicable laws and rules,

(b) comply with the provisions of MCR 2.113 and MCR 3.206(A),

(c) state the relief being requested, and

(d) be signed by the plaintiff or the IV-D agency. If the plaintiff is a minor, the complaint must be signed as provided in MCR 2.201(E).

(6) Notice. A notice to initiate an expedited paternity or expedited support action shall be titled "In the name of the people of the state of Michigan," and shall be signed by the IV-D agency. The notice must be directed to the defendant and include:

(a) the name and address of the court;

(b) the names and addresses of the parties;

(c) the case number and name of the assigned judge;

(d) the name, address, and phone number of the IV-D agency filing the action;

(e) the name and address of any attorney appearing in the matter;

(f) notice that written responses, agreements, and other actions must be filed with the court within 21 days after being served, and if the defendant fails to file a written response pursuant to statute or take other action within 21 days, an order or a judgment may be entered granting the relief requested in the complaint without further notice or hearing; and

(g) an expiration date, which does not exceed 126 days after the date the action is filed.

(7) Request to Enter Consent Agreement. A request for entry of a consent judgment or order to initiate an expedited paternity or expedited support action shall:

(a) state the following:

(i) the name and address of the court;

(ii) the names and addresses of the parties;

(iii) the name, address, and phone number of the IV-D agency filing the action; and

(iv) the name and address of any attorney appearing in the matter.

(b) contain the grounds for jurisdiction, the statutory grounds to enter the judgment or order, and a request for entry of the judgment or order without further notice; and

(c) be signed by the parties and the IV-D agency.

(C) Service.

(1) A complaint and notice filed under subrule (B)(1)(a) must be served on the parties by the IV-D agency in accordance with MCR 2.105, or in the alternative, may be served by mail in accordance with MCL 722.1495(4).

(2) Pursuant to MCL 722.1501(4)(c), a request to enter a consent judgment or order filed under subrule (B)(1)(b) is considered served at the time of filing, and a party's signature on the request to enter a consent agreement, or the consent judgment or order signifies acknowledgement of service.

(3) After a party has been served under subrule (C)(1) or (2), other court papers, orders, and notices shall be served in accordance with MCR 3.203.

(D) Dismissal as to Defendant Not Served.

(1) Upon expiration of the notice under subrule (B)(6)(g), the action is deemed dismissed without prejudice if the defendant has not been served with notice of the action unless the defendant has responded.

(2) A court shall set aside a dismissal of an action under this subrule without hearing upon showing by the IV-D agency within 28 days of the expiration of the notice that the defendant did in fact receive timely notice or had submitted to the court's jurisdiction before the dismissal.

(E) Setting Child Support.

(1) At the time that a complaint is filed, or any time after establishing paternity or a duty to support a child, the IV-D agency may provide notice setting a proposed support amount. The proposed support obligation shall be calculated by application of the Michigan Child Support Formula or a properly documented deviation from the amount calculated using the formula. The notice or an accompanying calculation results report must state the amounts calculated for support, the proposed effective date, and the facts and assumptions upon which the calculation is based.

(2) A notice and calculation report setting a child support amount shall be filed with the court and provided to the parties. The notice shall contain statements notifying the parties of all of the following:

(a) that objections and responses to the notice must be filed within 21 days from:

(i) the date of service, if the notice setting child support is served at the same time as the complaint and notice; or

(ii) the date of mailing or service, if the notice is served under MCR 3.203.

(b) a party may object to the proposed child support amount based on either a mistake in the facts or assumptions used to calculate support, or on an error in the calculation by filing an answer requesting a hearing on the proposed obligation;

(c) if no objection is filed, an order will be submitted to the court in the proposed amounts for entry without further notice or hearing;

(d) if an objection is filed, a hearing will be scheduled, unless the IV-D agency recalculates the amount and sends a new notice.

(3) If the IV-D agency receives information from a party after filing a notice setting a child support amount and before a support order is submitted for entry, the agency may recalculate support and issue a new notice and calculation report under this subrule proposing a corrected child support amount.

(F) Response.

(1) Within 21 days after being served with a notice under subrule (B) or a notice under subrule (E), a party must file a response with the court or take another action permitted by law or these rules. The party must serve copies of the response on the IV-D agency and the other party in accordance with MCR 3.203.

(2) The IV-D agency shall immediately forward to the court any response it receives from a party who has not filed the response with the court.

(3) A request to enter a consent agreement, or a consent judgment or order filed under subrule (B)(1)(b) does not require a response. A party may file an additional response or motion regarding issues not resolved by the agreement, consent judgment or order, or the other party filing an additional response.

(4) Within 14 days after the time permitted for responses under subrule (F)(1), if a party has filed a response, or pursuant to any matter left unresolved, the IV-D agency shall take one or more of the following actions:

(a) schedule genetic testing, if a party in an expedited paternity action requests genetic testing;

(b) schedule a hearing on any matters or relief proposed in a complaint or notice that are contested, and the IV-D agency may submit a proposed order or judgment that incorporates any proposed relief that was not contested; or

(c) submit a proposed judgment or order that incorporates any proposed relief that a party agrees to or that was not contested.

(G) Failure to Respond.

(1) Subrule MCR 3.210(B) does not apply to proceedings under this rule.

(2) If neither party in an action to establish paternity brought against an alleged father requests genetic tests and the defendant does not otherwise defend within 21 days after receiving notice, the IV-D agency may request entry of a judgment establishing defendant as the child's legal father by submitting a proposed judgment for entry.

(3) In an action to establish paternity brought by an alleged father against the child's mother, if the mother does not admit the alleged father's paternity, the court shall not determine paternity unless based on genetic test results.

(4) When a defendant does not respond or otherwise defend, the IV-D agency shall submit a proposed order that establishes the duty to support the child.

(5) If neither party files an objection to a notice setting a support amount within 21 days, the IV-D agency shall submit a support order in the recommended amounts to the court.

(6) Nonmilitary affidavits required by law must be filed before a judgment is entered in cases in which the defendant has failed to respond or appear.

(7) A judgment may not be entered against a minor or an incompetent person who has failed to respond or appear unless the person is assisted in the action by a conservator or other representative, except as otherwise provided by law.

(H) Judgments and Orders.

(1) The court may consider the complaints and other documents filed with the court, relevant and material affidavits, or other evidence when entering an order in an expedited paternity or support action.

(2) Entering Orders. The court may enter a proposed judgment or order submitted by the IV-D agency without hearing if the court is satisfied of all of the following:

(a) that the parties were given proper notice and opportunity to file a response,

(b) the statutory and rule requirements were met, and

(c) the terms of the judgment or order are in accordance with the law.

(3) The IV-D agency seeking entry of a proposed judgment or order must schedule a hearing and serve the motion, notice of hearing, and a copy of the proposed judgment or orders upon the parties at least 14 days before the hearing, and promptly file a proof of service when:

(a) the proposed judgment involves a request for relief that is different from the relief requested in the complaint; or

(b) the IV-D agency does not have sufficient facts to complete the judgment or order without a judicial determination of the relief to which the party is entitled.

(4) If the court determines that a proposed judgment or order is not in accordance with the law or that the court needs additional information to decide the matter, the court may direct the IV-D agency or the parties to do any of the following within 14 days:

(a) submit a modified proposed judgment or order in conformity with the court's ruling;

(b) file additional affidavits or other documents and notices, or

(c) schedule a hearing to present evidence sufficient to satisfy the court or to meet statutory requirements.

(5) A party may waive a statutory waiting period or further notice prior to entry of a consent judgment or order.

(6) If paternity of a child has not been established and a party or IV-D agency requests genetic testing, the court may order the parties and child to submit to genetic testing without a hearing.

(7) Upon entry of a judgment or order and as provided by MCR 3.203, the IV-D agency must serve a copy as entered by the court on all parties within 7 days after entry, and promptly file a proof of service.

Staff comment: The proposed amendment of MCR 3.201 and proposed addition of MCR 3.230 would provide procedural rules to incorporate the Summary Support and Paternity Act (366 PA 2014; MCL 722.1491, *et seq*.) to establish a parent's paternity or support obligation through a summary action.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-16. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered May 1, 2019:

PROPOSED AMENDMENT OF MCR 6.508.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.508 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.508. PROCEDURE; EVIDENTIARY HEARING; DETERMINATION.

(A)-(C) [Unchanged.]

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1)-(2) [Unchanged.]

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) [Unchanged.]

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial,

(A) but for the alleged error, the defendant would have had a reasonably likely chance of acquittal; or

(B) where the defendant rejected a plea based on incorrect information from the trial court or ineffective assistance of counsel, it is reasonably likely that

(1) the prosecutor would not have withdrawn any plea offer;

(2) the defendant and the trial court would have accepted the plea but for the improper advice; and

(3) the conviction or sentence, or both, under the plea's terms would have been less severe than under the judgment and sentence that in fact were imposed.

(ii)-(iv) [Unchanged.]

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.508 would enable a defendant to show actual prejudice in a motion for relief for judgment where defendant rejected a plea based on incorrect information from the trial court or ineffective assistance of counsel, and it was reasonably likely the defendant and court would have accepted the plea (which would have been less severe than the judgment or sentence issued after trial) but for the improper advice.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-02. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigan supreme court/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered May 10, 2019:

PROPOSED AMENDMENT OF MCR 3.501.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.501 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will

be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.501. CLASS ACTIONS.

(A)-(C) [Unchanged.]

(D) Judgment.

(1)-(5) [Unchanged.]

(6) Any order entering a judgment or approving a proposed settlement of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of any residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Michigan State Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of Michigan. Notwithstanding this requirement, the court may order the disbursement of all residual funds to a foundation or for any other purpose that has a direct or indirect relationship to the underlying litigation or otherwise promotes the interests of the members of the certified class.

(E)-(I) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.501 would require 50 percent of unclaimed class action funds be disbursed to the Michigan State Bar Foundation or other distribution as deemed appropriate by the court. This proposal is a slightly modified version of a proposal submitted to the Court by the Michigan State Planning Body and Legal Services Association of Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-02. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

MARKMAN, J. (*concurring*). I agree with the Court's decision to invite public comment concerning the proposed rule. In that regard, and against the backdrop of what I view as a reasonable and responsible

class action system in Michigan, I write to invite comment concerning the following matters in particular:

First, whether it constitutes an appropriate exercise of this Court's rulemaking authority to expand the purpose of the class action process from the compensation of specific victims of misconduct to the funding of public and charitable programs and activities that may have no relationship to the parties or the issue in the case, however worthy and meritorious those programs and activities might be.

Second, whether it constitutes an appropriate exercise of a court's "judicial power" under the Constitution—the authority to adjudicate particular cases and controversies—for that court to determine which public and charitable programs and activities will become the recipients of such funds.

Third, whether there is a basis for concern that the process of identifying the recipients of such funds may become an increasingly politicized exercise, one in which the personal perspectives, loyalties, and interests of the judge or attorney become determinative and in which various forms of lobbying activities come to be undertaken by interested groups and organizations.

Fourth, whether the trial court's authority to undertake such funding determinations may have an adverse impact, or an appearance of an adverse impact, upon that court's exercise of judgment in deciding the underlying class action or the amount of damages to be awarded in such lawsuit.

Fifth, whether there can be any effective review or appellate oversight of such judicial funding decisions and, if so, by what procedures and standards.

Sixth, whether the proposed rule may disincentivize judges or lawyers from undertaking what might be more diligent, time-consuming, and costly efforts to identify unidentified claimants for class action awards.

Seventh, whether any meaningful limitation is imposed upon the funding discretion of judges who must determine that some "purpose" bears a "direct or indirect relationship to the underlying litigation or otherwise promotes the interests of the members of the certified class."

Eighth, whether there is an effective reordering of the attorney's relationship with his or her clients, beyond what is already inherent in the class action process, if substantial class action awards go not to these clients but to the funding needs of specific public and charitable programs and activities, the determination of which may have been made by the trial court with the assistance of such attorney.

Ninth, whether it is redefining of the lawyer-client relationship, or otherwise inconsistent with the Rules of Professional Conduct of this state, for an attorney in a class action to negotiate an element of a settlement of that action that is exclusively beneficial to a nonclaimant group or organization.

Tenth, whether specifically in class actions, additional procedures are necessary to ensure that the interests of claimants are fully and fairly protected rather than placed in competition with the interests of nonclaimants seeking to use the proposed rule to fund public and charitable programs and activities.

Eleventh, whatever the disposition of unclaimed funds in a class action, if claimants cannot be identified, whether that fact should have any effect on the calculation of attorney's fees.

Twelfth, however unsympathetic the losing defendant in a class action may be, whether it constitutes an appropriate sanction that such defendant be held responsible, not merely for compensating its victims, but also for the funding of public or charitable programs or activities that have been deemed to have a "direct or indirect relationship to the underlying litigation or otherwise promote[] the interests of the members of the certified class." See *Grigg v Mich Nat'l Bank*, 405 Mich 148, 219-220 (1979) (LEVIN, J., dissenting) (including as an appendix the Uniform Class Actions Rule, which provides in § 15(c)(5) that "the court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court[,] after [a] hearing[,] shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the *defendant*") (emphasis added).

Thirteenth, whether there is cause for concern that some losing class action defendants will view awards made to public and charitable programs and activities as a preferable "public relations" alternative to these same funds being paid to private claimants and therefore make it more likely that such defendants will prefer to negotiate in favor of these types of dispositions rather than identifying actual claimants. See., e.g, *Frank v Gaos*, 586 US ___; 139 S Ct 1041 (2019).

Fourteenth, to what extent, if any, the proposed rule will affect the prevalence or the breadth of class actions brought in Michigan, including but not limited to the incentivization of so-called "noninjury" lawsuits in which the administrative costs of identifying large numbers of small claimants may outweigh the benefits of relatively small class action recoveries.

Fifteenth, how appropriately to respond to United States Supreme Court Chief Justice John Roberts's inquiry "when, *if ever*, [a cy pres class action settlement] should be considered [and] how to assess its fairness as a general matter . . . ." *Marek v Lane*, 571 US 1003, 1006 (2013) (statement of Roberts, C.J.) (emphasis added).

Sixteenth, whether the disposition of unclaimed class action awards should be a matter determined, as here, by the court rule process—in which public comment comes largely from the bench and bar—or by the legislative process, in which public comment derives more broadly from its representative nature.

Order Entered May 15, 2019:

PROPOSED AMENDMENTS OF MCR 1.109, 2.107, 2.113, 2.116, 2.119, 2.222, 2.223, 2.225, 2.227, 3.206, 3.211, 3.212, 3.214, 3.303, 3.903, 3.921, 3.925, 3.926, 3.931, 3.933, 3.942, 3.950, 3.961, 3.971, 3.972, 4.002, 4.101, 4.201, 4.202, 4.302, 5.128, 5.302, 5.731, 6.101, 6.615, 8.105, AND 8.119 AND PROPOSED RESCISSION OF MCR 2.226 AND 8.125.

On order of the Court, this is to advise that the Court is considering amendments of Rules 1.109, 2.107, 2.113, 2.116, 2.119, 2.222, 2.223, 2.225, 2.227, 3.206, 3.211, 3.212, 3.214, 3.303, 3.903, 3.921, 3.925, 3.926, 3.931, 3.933, 3.942, 3.950, 3.961, 3.971, 3.972, 4.002, 4.101, 4.201, 4.202, 4.302, 5.128, 5.302, 5.731, 6.101, 6.615, 8.105, and 8.119 and a proposed rescission of Rules 2.226 and 8.125 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1) Form and Captions of Documents.

(a) All documents prepared for filing in the courts of this state and all documents prepared by the court for placement in a case file must be legible and in the English language, comply with standards established by the State Court Administrative Office, and be on good quality 8½ by 11 inch paper or transmitted through an approved electronic means and maintained as a digital image. The ~~print must be no smaller than 10 characters per inch (nonproportional) or 12-point (proportional)~~font size must be 12 or 13 point for body text and no less than 10 point for footnotes, except with regard to forms approved by the State Court Administrative Office. Transcripts filed with the court must contain only a single transcript page per document page, not multiple pages combined on a single document page.

(b)-(g) [Unchanged.]

(2)-(8) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER DOCUMENTS.

(A)-(C) [Unchanged.]

(D) Proof of Service. Except as otherwise provided by MCR 2.104, 2.105, or 2.106, proof of service of documents required or permitted to be served ~~may~~must be by written acknowledgment of service, or a written statement by the individual who served the documents verified under

MCR 1.109(D(3). The proof of service may be included at the end of the document as filed. Proof of service must be filed promptly and at least at or before a hearing to which the document relates.

(E)-(F) [Unchanged.]

RULE 2.113. FORM, CAPTIONING, SIGNING, AND VERIFYING OF DOCUMENTS.

(A) Applicability. The form, captioning, signing, and verifying of all documents are prescribed in MCR 1.109(D) and (E).

(B) [Unchanged.]

(C) ~~Exhibits;~~ Written Instruments.

(1) If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading ~~as an exhibit~~and labeled according to standards established by the State Court Administrative Office unless the instrument is

(a)-(d) [Unchanged.]

(2) An ~~exhibit attached or referred~~attachment or reference to an attachment under subrule (~~F~~C)(1)(a) or (b) is a part of the pleading for all purposes.

(D) [Unchanged.]

RULE 2.116. SUMMARY DISPOSITION.

(A)-(F) [Unchanged.]

(G) Affidavits; Hearing.

(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a)-(b) [Unchanged.]

(c) Except where electronic filing has been implemented, a~~A~~ copy of a motion, response (including brief and any affidavits), or reply brief filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten. Where electronic filing has been implemented, a judge's copy may not be required.

(2)-(6) [Unchanged.]

(H)-(J) [Unchanged.]

RULE 2.119. MOTION PRACTICE.

(A) Form of Motions.

(1) [Unchanged.]

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based, and must comply with the provisions of MCR 7.215(C) regarding citation of unpublished Court of Appeals opinions.

(a)-(c) [Unchanged.]

(d) Except where electronic filing has been implemented, a~~A~~ copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet;

that notation may be handwritten. Where electronic filing has been implemented, a judge's copy may not be required.

(B)-(G) [Unchanged.]

RULE 2.222. CHANGE OF VENUE; VENUE PROPER.

(A)-(C) [Unchanged.]

(D) Order for Change of Venue; Case Records.

(1) The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. The court must order the party that moved for change of venue to pay the applicable statutory filing fee to the receiving court.

(2) The transferring court must serve the order on the parties and send a copy to the receiving court. The clerk of the transferring court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(3) The receiving court must temporarily suspend payment of the filing fee and open a case pending payment of the filing fee as ordered by the transferring court. The receiving court must notify the party that moved for change of venue of the new case number in the receiving court, the amount due, and the due date.

(~~D~~E) Payment of Filing and Jury Fees~~ After Change of Venue~~.

(1) ~~At or before the time the order changing venue is entered, t~~The party that moved for change of venue ~~shall tender a negotiable instrument in the amount of the applicable filing fee, payable to the court to which the case is to be transferred. The transferring court shall send the negotiable instrument with the case documents to the transferee court.~~ must pay to the receiving court within 28 days of the date of the transfer order the applicable filing fee as ordered by the transferring court. No further action may be had in the case until payment is made. If the fee is not paid to the receiving court within 28 days of the date of the order, the receiving court must order the case transferred back to the transferring court.

(2) If ~~the~~a jury fee has been paid, the clerk of the transferring court ~~shall~~must forward it to the clerk of the receiving court ~~to which the action is transferred~~as soon as possible after the case records have been transferred.

~~(E) In tort actions filed between October 1, 1986, and March 28, 1996, if venue is changed because of hardship or inconvenience, the action may be transferred only to the county in which the moving party resides.~~

RULE 2.223. CHANGE OF VENUE; VENUE IMPROPER.

(A) [Unchanged.]

(B) Order for Change of Venue; Case Records.

(1) The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. The court must order the plaintiff to pay the applicable statutory filing fee

directly to the receiving court. The court may also order the plaintiff to pay reasonable compensation and attorney fees to the defendant if the case was filed in the wrong court.

(2) The transferring court must serve the order on the parties and send a copy to the receiving court. The clerk of the transferring court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(3) The receiving court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the transferring court. The receiving court must notify the plaintiff of the new case number in the receiving court, the amount due, and the due date.

(~~B~~C) ~~Costs; Fees~~Payment of Filing and Jury Fees After Change of Venue.

(1) ~~The court shall order the change at the plaintiff's cost, which shall include the statutory filing fee applicable to the court to which the action is transferred, and which may include reasonable compensation for the defendant's expense, including reasonable attorney fees, in attending in the wrong court.~~

(~~2~~) The plaintiff must pay to the receiving court within 28 days of the date of the transfer order the applicable filing fee, costs, and expenses as ordered by the transferring court or the receiving court will dismiss the action. ~~After transfer, n~~No further proceedings may be had in the action until ~~the costs and expenses allowed under this rule~~payment has been made~~have been paid. If they are not paid within 56 days from the date of the order changing venue, the action must be dismissed by the court to which it was transferred.~~

(2~~3~~) If ~~the~~a jury fee has been paid, the clerk of the transferring court ~~shall~~must forward it to the clerk of the receiving court as soon as possible after the case records have been~~to which the action is~~ transferred.

(3~~4~~) [Renumbered but otherwise unchanged.]

RULE 2.225. JOINDER OF PARTY TO CONTROL VENUE.

(A) [Unchanged.]

(B) Order for Change of Venue; Case Records.

(1) The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. The court must order the plaintiff to pay the applicable statutory filing fee directly to the receiving court. The court may also order the plaintiff to pay reasonable compensation and attorney fees to the defendant when necessary to accomplish the transfer.

(2) The transferring court must serve the order on the parties and send a copy to the receiving court. The clerk of the court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(3) The receiving court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the transferring court. The receiving court must notify the plaintiff of the new case number in the receiving court, the amount due, and the due date.

(~~B~~C) Payment of Filing and Jury Fees After Transfer ~~Costs~~. ~~A transfer under this rule must be made at the plaintiff's cost, which shall include the statutory filing fee applicable to the court to which the action is transferred, and which may include reasonable compensation for the defendant's expense, including reasonable attorney fees, necessary to accomplish the transfer.~~

(1) The plaintiff must pay to the receiving court within 28 days of the date of the transfer order the applicable filing fee and any expenses or attorney fees as ordered by the transferring court or the receiving court will dismiss the action.

(2) If a jury fee has been paid, the clerk of the transferring court must forward it to the clerk of the receiving court as soon as possible after the case records have been transferred.

~~(C) Jury Fee. If the jury fee has been paid, the clerk of the transferring court shall forward it to the clerk of the court to which the action is transferred.~~

~~RULE 2.226. CHANGE OF VENUE, ORDERS.~~

~~The court ordering a change of venue shall enter all necessary orders pertaining to the certification and transfer of the action to the court to which the action is transferred.~~

RULE 2.227. TRANSFER OF ACTIONS ON FINDING OF LACK OF JURISDICTION.

(A) Transfer to Court Which Has Jurisdiction.

~~(1)~~ When the court in which a civil action is pending determines that it lacks jurisdiction of the subject matter of the action, but that some other Michigan court would have jurisdiction of the action, the court may order the action transferred to the other court in a place where venue would be proper. If the question of jurisdiction is raised by the court on its own initiative, the action may not be transferred until the parties are given notice and an opportunity to be heard on the jurisdictional issue.

~~(2) As a condition of transfer, the court shall require the plaintiff to pay the statutory filing fee applicable to the court to which the action is to be transferred, and to pay reasonable compensation for the defendant's expense, including reasonable attorney fees, in attending in the wrong court.~~

~~(3) If the plaintiff does not pay the filing fee to the clerk of the court transferring the action and submit proof to the clerk of the payment of any other costs imposed within 28 days after entry of the order of transfer, the clerk shall notify the judge who entered the order, and the judge shall dismiss the action for lack of jurisdiction. The clerk shall notify the parties of the entry of the dismissal.~~

~~(4) After the plaintiff pays the fee and costs, the clerk of the court transferring the action shall promptly forward to the clerk of the court~~

~~to which the action is transferred the original papers filed in the action and the filing fee and shall send written notice of this action to the parties. If part of the action remains pending in the transferring court, certified copies of the papers filed may be forwarded, with the cost to be paid by the plaintiff.~~

(B) Order Transferring Jurisdiction; Case Records.

(1) The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. The court must order the plaintiff to pay the applicable statutory filing fee directly to the receiving court. The court may also order the plaintiff to pay reasonable compensation and attorney fees to the defendant for filing the case in the wrong court.

(2) The transferring court must serve the order on the parties and send a copy to the receiving court. The clerk of the court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(3) The receiving court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the transferring court. The receiving court must notify the plaintiff of the new case number in the receiving court, the amount due, and the due date.

(C) Payment of Filing and Jury Fees After Transfer.

(1) The plaintiff must pay to the receiving court within 28 days of the date of the transfer order the applicable filing fee and must submit proof of the payment of any expenses as ordered by the transferring court or the receiving court will dismiss the action.

(2) If a jury fee has been paid, the clerk of the transferring court must forward it to the clerk of the receiving court as soon as possible after the case records have been transferred.

(~~B~~D) Procedure After Transfer.

(1) The action proceeds in the receiving court ~~to which it is transferred~~ as if it had been originally filed there. If further pleadings are required or allowed, the time for filing them runs from the date the ~~clerk sends notice that the file has been forwarded under subrule (A)(4)~~filing fee is paid under subrule (C)(1). The receiving court ~~to which the action is transferred~~ may order the filing of new or amended pleadings. If part of the action remains pending in the transferring court, certified copies of the papers filed may be forwarded, with the cost to be paid by the plaintiff.

(2) If a defendant had not been served with process at the time the action was transferred, the plaintiff must obtain the issuance of a new summons ~~by~~from the receiving court ~~to which the action is transferred~~.

(3) A waiver of jury trial in the court in which the action was originally filed is ineffective after transfer. A party who had waived trial by jury may demand a jury trial after transfer by filing a demand and paying the applicable jury fee within 28 days after the ~~clerk sends the notice that the file has been forwarded under subrule (A)(4)~~filing fee is paid under subrule (C)(1). A demand for a jury trial in the court in which

the action was originally filed is preserved after transfer. ~~If the jury fee had been paid, the clerk shall forward it with the file to the clerk of the court to which the action is transferred.~~

(~~C~~E) [Relettered but otherwise unchanged.]

RULE 3.206. INITIATING A CASE.

(A) Information in Case Initiating Document.

(1) The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E).

(2)-(6) [Unchanged.]

(B) [Unchanged.]

(C) Verified Statement.

(1) In an action involving a minor, or if child support or spousal support is requested, the party seeking relief must provide to the friend of the court~~attach~~ a verified statement containing, at a minimum, personal identifying, financial, and health care coverage information of the parties and minor children. A copy of the verified statement must be~~to the copies of the papers~~ served on the other party ~~and provided to the friend of the court~~. The verified statement must be completed on a form approved by the State Court Administrative Office.~~, stating~~

~~(a) the last known telephone number, post office address, residence address, and business address of each party;~~

~~(b) the social security number and occupation of each party;~~

~~(c) the name and address of each party's employer;~~

~~(d) the estimated weekly gross income of each party;~~

~~(e) the driver's license number and physical description of each party, including eye color, hair color, height, weight, race, gender, and identifying marks;~~

~~(f) any other names by which the parties are or have been known;~~

~~(g) the name, age, birth date, social security number, and residence address of each minor involved in the action, as well as of any other minor child of either party;~~

~~(h) the name and address of any person, other than the parties, who may have custody of a minor during the pendency of the action;~~

~~(i) the kind of public assistance, if any, that has been applied for or is being received by either party or on behalf of a minor, and the AFDC and recipient identification numbers; if public assistance has not been requested or received, that fact must be stated; and~~

~~(j) the health care coverage, if any, that is available for each minor child; the name of the policyholder; the name of the insurance company, health care organization, or health maintenance organization; and the policy, certificate, or contract number.~~

(2) The information in the verified statement is confidential, and is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order. For good cause, the addresses of a party and minors may be omitted from the copy of the statement that is served on the other party. If the party submitting the verified statement excludes an address for good cause, that party shall provide an alternate address where mail can be received.

(3) If any of the information required to be in the verified statement is omitted, the party seeking relief must explain the omission in the verified statement or in a separate statement, verified under MCR 1.109(D)(3)(b)~~a sworn affidavit, to be filed with the court~~.

(4) When the action is to establish paternity or child support and the pleadings are generated from Michigan's automated child support enforcement system, the party is not required to comply with subrule (C)(1). However, the party may comply with subrule (C)(1) to provide the other party an opportunity to supply any omissions or correct any inaccuracies.

(D) [Unchanged.]

RULE 3.211. JUDGMENTS AND ORDERS.

(A)-(E) [Unchanged.]

(F) Entry of Judgment or Order

(1) [Unchanged.]

(2) The party submitting the first temporary order awarding child custody, parenting time, or support and the party submitting any final proposed judgment awarding child custody, parenting time, or support must:

(a) serve the friend of the court office and, unless the court orders otherwise, all other parties, with a completed copy of the latest version of the state court administrative office's D~~d~~omestic R~~r~~elations Judgment Information F~~f~~orm, and

(b) file a proof of service with the court certifying that the Domestic Relations Judgment Information F~~f~~orm has been provided to the friend of the court office and, unless the court orders otherwise, to all other parties.

(3) If the court modifies the proposed judgment or order before signing it, the party submitting the judgment or order must, within 7 days, submit a new Domestic Relations Judgment Information F~~f~~orm to the friend of the court if any of the information previously submitted changes as a result of the modification.

(4) Before it signs a judgment or order awarding child support or spousal support, the court must determine that:

(a) the party submitting the judgment or order has certified that the Domestic Relations Judgment Information F~~f~~orm in subrule (F)(2) has been submitted to the friend of the court, and

(b) [Unchanged.]

(5) The Domestic Relations Judgment Information F~~f~~orm must be ~~filed~~submitted to the friend of the court in addition to the verified statement that is required by MCR 1~~.109(D)(3)~~3.206(C).

(G)-(H) [Unchanged.]

RULE 3.212. POSTJUDGMENT TRANSFER OF DOMESTIC RELATIONS CASES.

(A)-(C) [Unchanged.]

(D) ~~Transfer~~ Order for Transfer; Case Records.

(1) The transferring court ~~ordering a postjudgment transfer~~ must enter all necessary orders pertaining to the certification and postjudg-

ment transfer of the action to the receiving court. ~~The transferring court must send to the receiving court all court files and friend of the court files, ledgers, records, and documents that pertain to the action. Such materials may be used in the receiving jurisdiction in the same manner as in the transferring jurisdiction.~~

(a) The court may not enter an order transferring until all pending matters in the case have been resolved.

(b) The court must order the party who moved for the transfer to pay the applicable statutory filing fee directly to the receiving court unless fees have been waived in accordance with MCR 2.002.

(c) If the parties stipulate to the transfer of a case, they must share equally the cost of transfer unless the court orders otherwise.

(d) The court may also order one or both of the parties or the court-ordered custodian to pay past-due fees and costs under subrule (D)(4). Until all filing fees and court-ordered past-due fees and costs are paid, no further action in the case shall occur in the transferring court unless the moving party first demonstrates good cause and that substantial harm will occur absent the transferring court's immediate consideration.

(e) If the court or the friend of the court initiates the transfer, the statutory filing fee is waived.

(2) Except as otherwise ordered under subrule (D)(4), the transferring court must serve the order on the parties and send a copy to the receiving court. The clerk of the court and the friend of the court each must prepare the court's case records and the friend of the court's case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(3) The receiving court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee as ordered by the transferring court. The receiving court must notify the party of the new case number in the receiving court, the amount due, and the due date.

(~~2~~4) The court may order that any past-due fees and costs be paid to the transferring friend of the court office at the time of transfer. If the court orders payment of past-due fees and costs, the order must state that the court will not send the order to the receiving court under subrule (1) and the records will not be transferred under subrule (2) until the past-due fees and costs are paid. If the past-due fees and costs are not paid within 28 days of entry, the transfer order becomes void.

~~(3) The court may order that one or both of the parties or court-ordered custodian pay the cost of the transfer.~~

(E) Payment of Filing Fee After Transfer. ~~An order transferring a case under this rule must provide that the party who moved for the transfer pay the statutory filing fee applicable to the court to which the action is transferred, except where MCR 2.002 applies. If the parties stipulate to the transfer of a case, they must share equally the cost of transfer unless the court orders otherwise. In either event, the transferring court must submit the filing fee to the court to which the action is transferred, at the time of transfer. If the court or the friend of the~~

~~court initiates the transfer, the statutory filing fee is waived.~~ The party that moved for transfer must pay to the receiving court within 28 days of the due date provided under subrule (D)(3) the applicable filing fee as ordered by the transferring court. No further action in the case shall occur in the receiving court until the filing fee is paid unless the moving party first demonstrates good cause and that substantial harm will occur absent the receiving court's immediate consideration. If the fee is not paid to the receiving court within 28 days of the due date, the receiving court must order the case transferred back to the transferring court.

~~(F) Physical Transfer of Files. Court and friend of the court files must be transferred by registered or certified mail, return receipt requested or by another a secure method of transfer.~~

(~~G~~F) [Relettered but otherwise unchanged.]

RULE 3.214. ACTION UNDER UNIFORM ACTS.

(A) [Unchanged.]

(B) RURESA Actions.

(1) [Unchanged.]

(2) Transfer; Initiating and Responding RURESA Cases.

(a)-(b) [Unchanged.]

(c) A court ordering a transfer must send to the court that issued the prior valid support order all pertinent ~~papers, including all court files and friend of the court files, ledgers,~~ records~~, and documents~~. The clerk of the court and the friend of the court office must prepare the court and friend of the court records for transfer in accordance with the transfer order and the Michigan Trial Court Records Management Standards. The records must be sent to the court that issued the prior valid support order by a secure method within one business day of the date of the transfer order.

~~(d) Court files and friend of the court files must be transferred by registered or certified mail, return receipt requested or by other a secure method.~~

(~~e~~d) [Relettered but otherwise unchanged.]

(C)-(D) [Unchanged.]

RULE 3.303. HABEAS CORPUS TO INQUIRE INTO CAUSE OF DETENTION.

(A)-(M) [Unchanged.]

(N) Answer.

(1) [Unchanged.]

(2) ~~Exhibits~~Attachments. If the prisoner is detained because of a writ, warrant, or other written authority, a copy must be attached to the answer ~~as an exhibit~~, and the original must be produced at the hearing. If an order under subrule (E) requires it, the answer must be accompanied by the certified transcript of the record and proceedings.

(3) [Unchanged.]

(O)-(Q) [Unchanged.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(20) [Unchanged.]

(21) "Petition authorized to be filed" refers to written permission given by the court to file ~~the petition containing the formal allegations against the juvenile or respondent with the clerk of the court~~the petition among the court's public records as permitted by MCR 3.925. Until a petition is authorized, it must be filed with the clerk and maintained as a nonpublic record, accessible only by the court and parties. After authorization, a petition and any associated records may be made nonpublic only as permitted by rule or statute.

(22)-(27) [Unchanged.]

(B) [Unchanged.]

(C) Child Protective Proceedings. When used in child protective proceedings, unless the context otherwise indicates:

(1) [Unchanged.]

(2) "Amended petition" means a petition filed to correct or add information to an original petition as defined in subrule (A)(21)~~, after it has been authorized, but~~ before it is adjudicated.

(3)-(13) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A) Delinquency Proceedings.

(1) General. In a delinquency proceeding, the court ~~shall direct that~~must notify the following persons ~~be notified~~ of each hearing except as provided in subrule (A)(3):

(a)-(g) [Unchanged.]

(2)-(3) [Unchanged.]

(B)-(E) [Unchanged.]

RULE 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT RECORDS; SETTING ASIDE ADJUDICATIONS.

(A)-(B) [Unchanged.]

(C) Judgments and Orders. The form and signing of judgments are governed by MCR 2.602(A)(1) and (2). Judgments and orders may be served on a person by first-class mail to the person's last known address, by e-mail under MCR 2.107(C)(4), or electronic service under MCR 1.109(G)(6)(a).

(D) Public Access to Case File Records; Confidential File.

(1) General. Except as otherwise required by MCR 3.903(A)(21), c~~C~~ase file records maintained under Chapter XIIA of the Probate Code, MCL 712A.1 *et seq*., other than confidential files, must be open to the general public.

(2) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 3.926. TRANSFER OF JURISDICTION; CHANGE OF VENUE.

(A) [Unchanged.]

(B) Transfer to County of Residence. When a minor is brought before the family division of the circuit court in a county other than that in which the minor resides, the court may request transfer of the case to the court in the county of residence before trial. The court shall not order transfer of the case until the court to which the case is to be transferred has granted the request to accept the transfer.

(1)-(3) [Unchanged.]

(C)-(E) [Unchanged.]

(F) Transfer of Records. ~~The court entering an order of transfer or change of venue shall send the original pleadings and documents, or certified copies of the pleadings and documents, to the receiving court without charge.~~

(1) The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. Where the courts have agreed to bifurcate the proceedings, the court adjudicating the case shall send any supplemented pleadings and other records ~~or certified copies of the supplemented pleadings and records~~ to the court entering the disposition in the case.

(2) The clerk of the court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(G) [Unchanged.]

RULE 3.931. INITIATING DELINQUENCY PROCEEDINGS.

(A) Commencement of Proceeding. Any request for court action against a juvenile must be by written petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E). When any pending or resolved family division case exists that involves family members of the person(s) named in the petition filed under subrule (B), the petitioner must attach to the petition a completed case inventory listing those cases, if known. The case inventory must be on a form approved by the State Court Administrative Office.

(B) [Unchanged.]

(C) Citation or Appearance Ticket.

(1) A citation or appearance ticket may be used to initiate a delinquency proceeding if the charges against the juvenile are limited to~~:~~

~~(a)~~ violations of the Michigan Vehicle Code, or of a provision of an ordinance substantially corresponding to any provision of that law, as provided by MCL 712A.2b.

~~(b) offenses that, if committed by an adult, would be appropriate for use of an appearance ticket under MCL 764.9c.~~

(2) [Unchanged.]

(D) [Unchanged.]

RULE 3.933. ACQUIRING PHYSICAL CONTROL OF JUVENILE.

(A) Custody Without Court Order. When an officer apprehends a juvenile for an offense without a court order and does not warn and release the juvenile, does not refer the juvenile to a diversion program, and does not have authorization from the prosecuting attorney to file a complaint and warrant charging the juvenile with an offense as though an adult pursuant to MCL 764.1f, the officer may:

(1)-(2) [Unchanged.]

(3) take the juvenile into custody and request the prosecutor to file~~submit~~ a petition, if:

(a)-(b) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 3.942. TRIAL.

(A) Time. In all cases the trial must be held within 6 months after the ~~filing~~authorization of the petition, unless adjourned for good cause. If the juvenile is detained, the trial has not started within 63 days after the juvenile is taken into custody, and the delay in starting the trial is not attributable to the defense, the court ~~shall forthwith~~must immediately order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter.

(B)-(D) [Unchanged.]

RULE 3.950. WAIVER OF JURISDICTION.

(A)-(C) [Unchanged.]

(D) Hearing Procedure. The waiver hearing consists of two phases. Notice of the date, time, and place of the hearings may be given either on the record directly to the juvenile or to the attorney for the juvenile, the prosecuting attorney, and all other parties, or in writing, served on each individual.

(1) First Phase. The first-phase hearing is to determine whether there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony, and that there is probable cause to believe that the juvenile who is 14 years of age or older committed the offense.

(a) The probable cause hearing ~~shall~~must be commenced within 28 days after the ~~filing~~authorization of the petition unless adjourned for good cause.

(b)-(c) [Unchanged.]

(2) Second Phase. If the court finds the requisite probable cause at the first-phase hearing, or if there is no hearing pursuant to subrule (D)(1)(c), the second-phase hearing shall be held to determine whether the interests of the juvenile and the public would best be served by granting the motion. However, if the juvenile has been previously subject to the general criminal jurisdiction of the circuit court under MCL 712A.4 or 600.606, the court shall waive jurisdiction of the juvenile to the court of general criminal jurisdiction without holding the second-phase hearing.

(a) The second-phase hearing ~~shall~~must be commenced within 28 days after the conclusion of the first phase, or within 35 days after the

~~filing~~authorization of the petition if there was no hearing ~~pursuant to~~under subrule (D)(1)(c), unless adjourned for good cause.

(b)-(e) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A) Form. Absent exigent circumstances, a request for court action to protect a child must be in the form of a petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E). When any pending or resolved family division case exists that involves family members of the person(s) named in the petition filed under subrule (B), the petitioner must attach to the petition a completed case inventory listing those cases, if known. The case inventory must be on a form approved by the State Court Administrative Office.

(B)-(C) [Unchanged.]

RULE 3.971. PLEAS OF ADMISSION OR NO CONTEST.

(A) General. A respondent may make a plea of admission or of no contest to the original allegations in the petition. The court has discretion to allow a respondent to enter a plea of admission or a plea of no contest to an amended petition. The plea may be taken at any time after the ~~filing~~authorization of the petition, provided that the petitioner and the attorney for the child have been notified of a plea offer to an amended petition and have been given the opportunity to object before the plea is accepted.

(B)-(C) [Unchanged.]

RULE 3.972. TRIAL.

(A) Time. If the child is not in placement, the trial must be held within 6 months after the ~~filing~~authorization of the petition unless adjourned for good cause under MCR 3.923(G). If the child is in placement, the trial must commence as soon as possible, but not later than 63 days after the child is removed from the home unless the trial is postponed:

(1)-(3) [Unchanged.]

When trial is postponed pursuant to subrule (2) or (3), the court shall release the child to the parent, guardian, or legal custodian unless the court finds that releasing the child to the custody of the parent, guardian, or legal custodian will likely result in physical harm or serious emotional damage to the child.

If the child has been removed from the home, a review hearing must be held within 182 days of the date of the child's removal from the home, even if the trial has not been completed before the expiration of that 182-day period.

(B)-(E) [Unchanged.]

RULE 4.002. TRANSFER OF ACTIONS FROM DISTRICT COURT TO CIRCUIT COURT.

(A) Counterclaim or Cross-Claim in Excess of Jurisdiction.

(1) If a defendant asserts a counterclaim or cross-claim seeking relief of an amount or nature beyond the jurisdiction or power of the district court in which the action is pending, and accompanies the notice of the

claim with a~~n affidavit~~ statement verified in the manner prescribed by MCR 1.109(D)(3) ~~stating~~indicating that the defendant is justly entitled to the relief demanded, the clerk shall record the pleadings ~~and affidavit~~ and present them to the judge to whom the action is assigned. The judge shall either order the action transferred to the circuit court to which appeal of the action would ordinarily lie or inform the defendant that transfer will not be ordered without a motion and notice to the other parties.

(2) ~~MCR 4.201(G)(2) and 4.202(I)(4) govern t~~Transfer of summary proceedings to recover possession of premises are governed under MCR 4.201(G)(2) and 4.202(I)(4) and subrules (C) and (D) of this rule.

(B) Change in Conditions.

(1) A party may, at any time, file a motion with the district court in which an action is pending, requesting that the action be transferred to circuit court. The motion must be supported by a~~n~~ statement verified in the manner prescribed by MCR 1.109(D)(3)~~affidavit stating~~ indicating that

(a)-(b) [Unchanged.]

(2) [Unchanged.]

~~(C) Conditions Precedent to Transfer. The action may not be transferred under this rule until the party seeking transfer pays to the opposing parties the costs they have reasonably incurred up to that time that would not have been incurred if the action had originally been brought in circuit court, and pays the statutory circuit court filing fee to the clerk of the court from which the action is to be transferred. If a case is entirely transferred from district court to circuit court and the jury fee was paid in the district court, the district court clerk shall forward the fee to the circuit court with the papers and filing fee under subrule (D). If the amount paid to the district court for the jury fee is less than the circuit court jury fee, then the party requesting the jury shall pay the difference to the circuit court.~~

~~(D) Filing in Circuit Court. After the court has ordered transfer and the costs and fees required by subrule (C) have been paid, the clerk of the court from which the action is transferred shall forward to the clerk of the circuit court the original papers in the action and the circuit court filing fee.~~

~~(E) Procedure After Transfer. After transfer no further proceedings may be conducted in the district court, and the action shall proceed in the circuit court. The circuit court may order further pleadings and set the time when they must be filed.~~

(C) Order for Transfer; Case Records.

(1) The district court must enter all necessary orders pertaining to the certification and transfer of the action to the circuit court. The district court must order the moving party to pay the applicable statutory filing fee directly to the circuit court.

(2) The district court may also order the party seeking transfer to pay the opposing parties the costs they have reasonably incurred up to that time that would not have been incurred if the action had originally been brought in circuit court.

(3) The district court must serve the order on the parties and send a copy to the circuit court. The clerk of the district court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(4) The circuit court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the district court. The circuit court must notify the moving party of the new case number in the circuit court, the amount due, and the due date.

(5) After transfer, no further proceedings may be conducted in the district court, and the action shall proceed in the circuit court. The circuit court may order further pleadings and set the time when they must be filed.

(D) Payment of Filing and Jury Fees After Transfer; Payment of Costs.

(1) The party that moved for transfer must pay to the circuit court within 28 days of the date of the transfer order the applicable filing fee as ordered by the district court. No further action may be had in the case until payment is made. If the fee is not paid to the circuit court within 28 days of the date of the transfer order, the circuit court will either dismiss the counterclaim or cross-claim or order the case transferred back to the district court.

(2) If the jury fee has been paid, the clerk of the district court must forward it to the clerk of the circuit court to which the action is transferred as soon as possible after the case records have been transferred. If the amount paid to the district court for the jury fee is less than the circuit court jury fee, then the party requesting the jury shall pay the difference to the circuit court.

(3) If the court ordered payment of costs, the moving party must pay them to the opposing parties within 28 days of the date of the transfer order. If the costs are not paid within 28 days of the date of entry, the circuit court will either dismiss the counterclaim or cross-claim and/or order the case transferred back to the district court to proceed on the original claim.

RULE 4.101. CIVIL INFRACTION ACTIONS.

(A) Citation; Complaint; Summons; Warrant.

(1) Except as otherwise provided by court rule or statute, a civil infraction action may be initiated by a law enforcement officer serving a written citation on the alleged violator; and filing the citation in the district court. The citation serves as the complaint in a civil infraction action and may be prepared electronically or on paper. The citation must be signed by the officer in accordance with MCR 1.109(E)(4); if a citation is prepared electronically and filed with a court as data, the name of the officer that is associated with issuance of the citation satisfies this requirement.

(a) If the infraction is a parking violation, the action may be initiated by an authorized person placing a citation securely on the vehicle or

mailing a citation to the registered owner of the vehicle. ~~In either event, the citation must be filed in the district court.~~

(b) [Unchanged.]

~~The citation serves as the complaint in a civil infraction action, and may be filed either on paper or electronically.~~

(2)-(4) [Unchanged.]

(B)-(E) [Unchanged.]

(F) Contested Actions; Notice; Defaults.

~~(1) A contested action may not be heard until a citation is filed with the court. If the citation is filed electronically, the court may decline to hear the matter until the citation is signed by the officer or official who issued it, and is filed on paper. A citation that is not signed and filed on paper, when required by the court, may be dismissed with prejudice.~~

(1~~2~~)-(4~~5~~) [Renumbered but otherwise unchanged.]

(G)-(H) [Unchanged.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A) [Unchanged.]

(B) Complaint.

(1) In General. The complaint must

(a)-(c) [Unchanged.]

(d) describe the premises or the defendant's holding if it is less than the entire premises; and

(e) show the plaintiff's right to possession and indicate why the defendant's possession is improper or unauthorized.~~; and~~

~~(f) demand a jury trial, if the plaintiff wishes one. The jury trial fee must be paid when the demand is made.~~

(2) Jury Demand. If the plaintiff wishes a jury trial, the demand must be made on a form approved by the State Court Administrative Office. They jury trial fee must be paid when the demand is made.

(2~~3~~) Specific Requirements.

(a)-(e) [Unchanged.]

(C)-(F) [Unchanged.]

(G) Claims and Counterclaims.

(1) [Unchanged.]

(2) Removal.

(a) [Unchanged.]

(b) If a money claim or counterclaim exceeding the court's jurisdiction is introduced, the court, on motion of either party or on its own initiative, shall order, in accordance with the procedures in MCR 4.002, removal of that portion of the action to the circuit court, if the money claim or counterclaim is sufficiently shown to exceed the court's jurisdictional limit.

(H)-(O) [Unchanged.]

RULE 4.202. SUMMARY PROCEEDINGS; LAND CONTRACT FORFEITURE.

(A)-(H) [Unchanged.]

(I) Joinder; Removal.

(1)-(3) [Unchanged.]

(4) If a money claim or counterclaim exceeding the court's jurisdiction is introduced, the court, on motion of either party or on its own initiative, shall order, in accordance with the procedures in MCR 4.002, removal of that portion of the action, if the money claim or counterclaim is sufficiently shown to exceed the court's jurisdictional limit.

(J) Judgment. The judgment

(1)-(4) [Unchanged.]

(5) Notice. The ~~court~~plaintiff must mail or deliver a copy of the judgment to the parties. The time period for applying for the order of eviction does not begin to run until the judgment is mailed or delivered.

(K)-(L) [Unchanged.]

RULE 4.302. STATEMENT OF CLAIM.

(A) Contents. The statement of the claim must be in an affidavit in substantially the form approved by the state court administrator. Affidavit forms shall be available at the clerk's office. The nature and amount of the claim must be stated in concise, nontechnical language, and the affidavit must state the date or dates when the claim arose. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E).

(B)-(D) [Unchanged.]

RULE 5.128. CHANGE OF VENUE.

~~(A)~~ Reasons for Change. On petition by an interested person or on the court's own initiative, the venue of a proceeding may be changed to another county by court order for the convenience of the parties and witnesses, for convenience of the attorneys, or if an impartial trial cannot be had in the county where the action is pending. Procedure for change of venue is governed by MCR 2.222 and MCR 2.223 except that a court must also transfer the original of an unadmitted will or a certified copy of an admitted will.

~~(B) Procedure. If venue is changed~~

~~(1) the court must send to the transferee court, without charge, copies of necessary documents on file as requested by the parties or the transferee court and the original of an unadmitted will or a certified copy of an admitted will; and~~

~~(2) except as provided in MCR 5.208(A) or unless the court directs otherwise, notices required to be published must be published in the county to which venue was changed.~~

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES.

(A) Methods of Commencement. A decedent estate may be commenced by filing an application for an informal proceeding or a petition for a formal testacy proceeding. A request for supervised administration may be made in a petition for a formal testacy proceeding.

(1) When filing either an application or petition to commence a decedent estate, a copy of the death certificate must be attached. If the death certificate is not available, the petitioner may provide alternative documentation of the decedent's death.

(2) Where electronic filing is implemented, if the application or petition to commence a decedent estate indicates that there is a will, it is available, and that it is not already in the court's possession, an exact copy of the will and any codicils must be attached to the application or petition. Within 7 days of the filing of the application or petition, the original will and any codicils must be filed with the court or the case will be dismissed without notice and hearing. Notice of a dismissal for failure to file the original will and any codicils shall be served on the petitioner and any interested persons in a manner provided under MCR 5.105(B).

(3) The court is prohibited from r~~R~~equiring additional documentation, such as information about the proposed or appointed personal representative~~, is prohibited~~.

(B)-(D) [Unchanged.]

RULE 5.731. ~~CONFIDENTIAL~~ ACCESS TO RECORDS.

Case r~~R~~ecords filed with the court under the mental health code are public except as otherwise indicated in court rule or statute.

RULE 6.101. ~~THE~~ COMPLAINT.

(A) [Unchanged.]

(B) Signature and Oath. The complaint must be signed ~~and sworn to before a judicial officer or court clerk~~and verified under MCR 1.109(D)(3). Any requirement of law that a complaint filed with the court must be sworn is met by this verification.

(C) [Unchanged.]

RULE 6.615. MISDEMEANOR TRAFFIC CASES.

(A) Citation; Complaint, Summons; Warrant.

(1) A misdemeanor traffic case may be ~~begun~~initiated by one of the following procedures:

(a) Service of a written citation by a law enforcement officer on the defendant, and the filing of the citation in the district court. The citation may be prepared electronically or on paper. The citation must be signed by the officer in accordance with MCR 1.109(E)(4); if a citation is prepared electronically and filed with a court as data, the name of the officer that is associated with issuance of the citation satisfies this requirement.

(b)-(c) [Unchanged.]

(2) [Unchanged.]

(B)-(C) [Unchanged.]

(D) Contested Cases.

~~(1) A contested case may not be heard until a citation is filed with the court. If the citation is filed electronically, the court may decline to hear the matter until the citation is signed by the officer or official who issued it, and is filed on paper. A citation that is not signed and filed on paper, when required by the court, may be dismissed with prejudice.~~

~~(2)~~ A misdemeanor traffic case must be conducted in compliance with the constitutional and statutory procedures and safeguards applicable to misdemeanors cognizable by the district court.

RULE 8.105. GENERAL DUTIES OF CLERKS.

(A)-(B) [Unchanged.]

(C) Notice of Judgments, Orders, and Opinions. ~~Notice of a judgment, final order, written opinion or findings filed or entered in a civil action in a court of record must be given forthwith in writing by t~~The court clerk must deliver, in the manner provided in MCR 2.107, a copy of the judgment, final order, written opinion, or findings entered in a civil action to the attorney~~s~~ or party who sought the order, judgment, opinion or findings. Except where e-Filing is implemented, if the attorney or party does not provide at least one copy when filing a proposed order or judgment, the clerk, when complying with this subrule, may charge the reproduction fee authorized by the court's local administrative order under MCR 8.119(H)(2).~~of record in the case, in the manner provided in MCR 2.107.~~

(D) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(H) [Unchanged.]

(I) Sealed Records.

(1)-(3) [Unchanged.]

(4) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C). Materials that are subject to a motion to seal a record in whole or in part ~~shall~~must be ~~held under seal~~made nonpublic temporarily pending the court's disposition of the motion.

(5)-(9) [Unchanged.]

(J)-(L) [Unchanged.]

~~RULE 8.125. ELECTRONIC FILING OF CITATION.~~

~~(A) Applicability. This rule applies to all civil infraction and misdemeanor actions initiated by a Michigan Uniform Law Citation or a Michigan Uniform Municipal Civil Infraction Citation.~~

~~(B) Citation; Complaint; Filing. A citation may be filed with the court either on paper or electronically. The filing of a citation constitutes the filing of a complaint. An electronic citation must contain all the information that would be required if the citation were filed on paper. A citation that contains the full name of the police officer or authorized local official who issued it will be deemed to have been signed pursuant to MCL 257.727c(3), 600.8705(3), or 600.8805(3).~~

~~(C) Contested Actions. If an electronic citation is contested, the court may decline to hear the matter until the citation is signed and filed on paper. A citation that is not signed and filed on paper, when required by the court, will be dismissed with prejudice.~~

Staff comment: The proposed amendments of MCR 1.109, 2.107, 2.113, 2.116, 2.119, 2.222, 2.223, 2.225, 2.227, 3.206, 3.211, 3.212, 3.214, 3.303, 3.903, 3.921, 3.925, 3.926, 3.931, 3.933, 3.942, 3.950, 3.961, 3.971, 3.972, 4.002, 4.101, 4.201, 4.202, 4.302, 5.128, 5.302, 5.731, 6.101, 6.615,

8.105, and 8.119 and proposed rescission of MCR 2.226 and 8.125 would continue the process for design and implementation of the statewide electronic-filing system.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupreme court/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered May 15, 2019:

PROPOSED AMENDMENT OF MCR 3.106.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.106 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupreme court/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.106. PROCEDURES REGARDING ORDERS FOR THE SEIZURE OF PROPERTY AND ORDERS OF EVICTION.

(A) [Unchanged.]

(B) Persons Who May Seize Property or Conduct Evictions. The persons who may seize property or conduct evictions are those persons named in MCR 2.103(B), and they are subject to the provisions of this rule unless a provision or a statute specifies otherwise.

(1) [Unchanged.]

(2) Each court must post, in a public place at the court, a list of those persons who are serving as court officers or bailiffs. The court must provide the State Court Administrative Office with a copy of the list and a copy of each court officer's bond required under subsection (D)(1), and must notify the State Court Administrative Office of any changes.

(C)-(H) [Unchanged.]

Staff comment: The proposed amendment of MCR 3.106 would require trial courts to provide a copy of each court officer's bond to SCAO along with the list of court officers.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-18. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered May 15, 2019:

PROPOSED AMENDMENT OF LOCAL COURT RULE 2.119 FOR THE COURT OF CLAIMS.

On order of the Court, this is to advise that the Court is considering an amendment of Local Court Rule 2.119 for the Court of Claims. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.119. MOTION PRACTICE.

(A) Form of Motions.

(1) [Unchanged.]

(2) The moving party must affirmatively state that he or she requested opposing counsel's concurrence in the relief sought on a specified date, and that opposing counsel has denied or not acquiesced in the relief sought, and therefore, that it is necessary to present the motion.

(2)-(6) [Renumbered (3)-(7) but otherwise unchanged.]

(B)-(G) [Unchanged.]

Staff comment: The proposed amendment of LCR 2.119 for the Court of Claims would require a moving party to affirmatively state that he or she has sought concurrence in the relief sought on a specific date, and opposing counsel denied concurrence in the relief sought.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-28. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered May 15, 2019:

PROPOSED AMENDMENT OF MCR 8.115.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.115 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 8.115. COURTROOM DECORUM; POLICY REGARDING USE OF CELL PHONES OR OTHER PORTABLE ELECTRONIC COMMUNICATION DEVICES.

(A)-(B) [Unchanged.]

(C) Use of~~Establishment of a Policy Regarding~~ Portable Electronic ~~Communication~~ Devices in a Courthouse.

(1) Purpose. This rule specifies the permitted and prohibited uses of portable electronic devices in a courthouse. A court must use reasonable means to advise courthouse visitors of the provisions of this rule. This rule does not modify or supersede the guidelines for media coverage of court proceedings set forth in AO No. 1989-1.~~A facility that contains a courtroom may determine use of electronic equipment in nonjudicial areas of the facility.~~

(2) ~~The chief judge may establish a policy regarding the use of cell phones or other portable electronic communication devices within the court, except that no photographs may be taken of any jurors or witnesses, and no photographs may be taken inside any courtroom without permission of the court. The policy regarding the use of cell phones or other portable electronic communication devices shall be posted in a conspicuous location outside and inside each courtroom. Failure to comply with this section or with the policy established by the chief judge may result in a fine, including confiscation of the device, incarceration, or both for contempt of court.~~ Definitions. The following definitions apply in this rule:

(a) "portable electronic device" is a mobile device capable of electronically storing, accessing, or transmitting information. The term encompasses, among other things, a transportable computer of any size, including a tablet, a notebook, and a laptop; a smart phone, a cell phone, or other wireless phone; a camera and other audio or video recording devices; a personal digital assistant (PDA); other devices that provide internet access; and any similar items.

(b) A "courthouse" includes all areas within the exterior walls of a court building, or if the court does not occupy the entire building, that portion of the building used for the administration and operation of the court. A "courthouse" also includes areas outside a court building where a judge conducts an event concerning a court case.

(c) "Courtroom participant" includes a litigant (plaintiff or defendant), witness, or juror who is present in the courtroom as part of a proceeding.

(3) Photography and audio or video recording or broadcasting. The following restrictions apply to photography, audio recording, video recording or broadcasting in a courthouse.

(a) In a courtroom: In a courtroom, no one may use a portable electronic device to take photographs or for audio or video recording or broadcasting unless that use is specifically allowed by the Judge presiding over that courtroom.

(b) Outside a courtroom: In areas of a courthouse other than courtrooms, no one may photograph, record, or broadcast an individual without that individual's prior express consent.

(c) Jurors: No one may photograph, record, or broadcast any juror or anyone called to the court for jury service.

(d) Local orders: By local administrative order, a court may adopt further reasonable limits on photography and audio or video recording or broadcasting in a courthouse that are not inconsistent with this rule.

(e) Violations of this subsection: Violations of this subsection are punishable by appropriate sanctions up to and including contempt of court as determined in the discretion of the court.

(4) Jurors and witnesses. The following restrictions apply to use of portable electronic devices by jurors, including prospective jurors, and by witnesses.

(a) Jurors: Jurors must turn off their portable electronic devices while present in a courtroom. A court may order jurors to turn over to

the court their portable electronic devices during deliberations. If so, the court must provide jurors with a phone number where they can be reached in case of an emergency during deliberations.

(b) Witnesses: A witness must silence any portable electronic device while in a courtroom, and may use a device while testifying only with permission of a judge.

(5) Attorneys, parties, and members of the public. The following provisions apply to use of portable electronic devices in a courtroom by attorneys, parties, and members of the public. Any allowed use of a portable electronic device under this paragraph is subject to the authority of a judge to terminate activity that is disruptive or distracting to a court proceeding, or that is otherwise contrary to the administration of justice.

(a) Allowed uses: Attorneys, parties, and members of the public may use a portable electronic device in a courtroom to retrieve or to store information (including notetaking), to access the Internet, and to send and receive text messages or information. Attorneys, parties, and members of the public may use a portable electronic device to reproduce public court documents in a clerk's office as long as the device leaves no mark or impression on the document and does not unreasonably interfere with the operation of the clerk's office.

(b) Prohibited uses: Attorneys, parties, and members of the public must silence portable electronic devices while in the courtroom. A portable electronic device may not be used, without permission of the court, to make or to receive telephone calls or for any other audible function while court is in session. Portable electronic devices may not be used to communicate in any way with any courtroom participant including, but not limited to, a party, a witness, or juror at any time during any court proceedings. Additional prohibited uses related to photography, recording, and broadcasting are found in 8.115(C)(3) above.

(6) Use of a portable electronic device outside a courtroom; limitations. Except as provided in paragraphs (3), (4) and (5) of this rule, a person may use a portable electronic device in a courthouse, subject to the authority of judges, Clerks of the Court, or court administrators to limit or terminate activity that is disruptive to court operations or that compromises courthouse security. Such limitations and terminations must be consistent with this rule.

(7) Violations of this rule. If these rules are violated, the presiding judge may confiscate the device for the remainder of the day or order that the phone be turned off and put away. After a serious intentional violation, or multiple violations, the presiding judge may impose any other appropriate sanction, including contempt of court and/or the removal of person or persons from the courtroom during a time when they are not actively involved in the case being heard.

Staff comment: The proposed amendment of MCR 8.115, submitted by the Michigan State Planning Body, would explicitly allow the use of cellular phones (as well as prohibit certain uses) in a courthouse. The proposal is intended to make cell phone and electronic device use

policies more consistent from one court to another, and broaden the ability of litigants to use their devices in support of their court cases when possible.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-30. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].